Supreme Court, U.S.
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No. 05-

IN THE
Supreme Court of the United States

WARREN DAVIS,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), UAW REGION 2B, RONALD GETTELFINGER, AND LLOYD MAHAFFEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May an order remanding a removed case to state court be reviewed, notwithstanding the prohibition in 28 U.S.C. § 1447(d),

> (a) where the district court expressly states that it is basing its decision to remand on lack of jurisdiction, and not that the remand is based on a ground not specified by section 1447(c) or by a comparable statute, or
>
> (b) where the court of appeals hypothesized that the district court had supplemental jurisdiction?

2. May a state law claim be removed from state court on grounds of complete preemption absent a determination that Congress created an alternate private right of action and intended to displace the state claims with federal claims of which the district court would have had jurisdiction?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-11a) is reported at 392 F.3d 834. The district court's opinion and order, remanding the case to the Cuyahoga County, Ohio Court of Common Pleas (Pet App. 12a to 32a), is unreported.

JURISDICTION

The decision of the United States Court of Appeals was issued on December 15, 2004. Pet. App. 1a. A timely petition for rehearing was denied on February 28, 2005. Pet. App. 33a. On May 26, 2005, Justice Stevens granted a motion for extension of time, until June 30, 2005. On June 22, 2005 Justice Stevens further extended the time for filing until July 15, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of 28 U.S.C. §§ 1367 and 1447, the Labor-Management Reporting and Disclosure Act, and the Ohio Age Discrimination law are set forth at Pet. App. 35a to 41a.

STATEMENT

A. Facts.

Petitioner Warren Davis was the elected Director of Region 2 of the respondent United Auto Workers Union ("UAW"), which contained approximately 41,000 union members in Ohio, Pennsylvania and West Virginia. The UAW's regional and national officers are elected at a quadrennial convention, the most recent of which was in June 2002. The UAW does not have any official enacted retirement

rule. However, all elected officials of the UAW comprise the "Administration Caucus" of the UAW which, in turn, maintains a series of customary rules governing union activities.[1]

One such rule is a facially discriminatory prohibition against members running for office after their 65th birthday, even though the federal age discrimination law, and many state laws, extend protection against compulsory retirement to employees over 65. In defiance of this rule, and without prior warning of his intentions, petitioner Davis ran for re-election as director at the UAW's Convention in June, 2002; because he was the only candidate in the election he was elected. Respondents, including Ronald Gettelfinger, President of the UAW, and Lloyd Mahaffey, who was ultimately elected as director of respondent Region 2B, were outraged by Davis' successful candidacy in defiance of the retirement rule. Respondents took several actions in reprisal, including the issuance of statements that Davis had violated the retirement rule, lied to the membership, and denied them an honest election by failing to reveal his candidacy until the last moment, when it was too late for the Administration Caucus to arrange an alternate candidate to run against him. At the behest of the Administration Caucus, the territory of Region 2 was divided into several surrounding regions, each of which now contained portions of Region 2, for the purpose of eliminating the position

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[1]Many Caucus rules would be patently unlawful if adopted by the union; the Caucus attempts to insulate the union from liability by keeping the rules "informal" and enforceable only through iron political discipline. One of the ultimate issues on the merits of this case is whether this strategem succeeds in insulating the union from liability under state law, and whether federal law forbids a state from reaching union discrimination that is implemented in this manner.

to which Davis had been elected. New elections were then held for the newly created regions. Davis, who had not campaigned in the areas surrounding his old region, recognized the effectiveness of the gerrymander and declined to run in these elections.

After exhausting his intra-union remedies, Davis protested to the United States Department of Labor against the maneuvers that had eliminated his election. Although Davis' protest did not address the issue of age discrimination, the Labor Department, in rejecting Davis' claims, stated that the Administration Caucus retirement rule was not a "governing rule imposing an age limitation on candidates for office," and that, in any event, the ADEA exception for employees who hold "high policymaking positions" applied to the position of Director of Region 2. Accordingly, the Secretary declined to file suit under section 402(b) of the LMRDA, 29 U.S.C. § 482(b), to set aside the election for the UAW positions that had been created in retaliation for Davis' candidacy.

B. Proceedings Below.

Davis commenced this action in the Court of Common Pleas, Cuyahoga County, Ohio. The complaint alleged that the elimination of Davis' position violated Ohio Revised Code § 4112.14, which forbids both age discrimination in employment and retaliation against persons who oppose discrimination. Similarly, Davis alleged wrongful discharge in violation of Ohio public policy against retaliation against persons who oppose age discrimination. Finally, the complaint alleged libel claims based on respondents' written statements about Davis' "lying," "fraud," and "unethical, self-dealing" conduct in office, and slander claims based on similar oral statements accusing Davis of having "lied" and been "deceitful." The complaint sought compensatory and punitive damages, attorney fees, and

injunctive relief including reinstatement to the position that had been discriminatorily eliminated.[2]

On July 2, 2003, respondents removed the case to the United States District Court for the Northern District of Ohio, claiming subject matter jurisdiction under 28 U.S.C. § 1331 and sections 401 through 403 of the LMRDA, 29 U.S.C. §§ 481-483.[3] A week later, respondents moved to dismiss, arguing that, because Davis' claims challenged the outcome of a union election, they were completely preempted by federal law, and hence within the district court's original jurisdiction. Respondents also asserted that any state claims that were not "completely preempted" were within the district court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a).

Davis moved to remand, arguing that his claims were based entirely on state law, and were neither preempted nor completely preempted. He pointed out that he was not challenging the outcome of a union election, but only claiming that the elimination of his position, which happened to be subject to election, was based on age discrimination and

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[2] Davis was also a plaintiff, along with three other UAW members, in a lawsuit filed in the Eastern District of Michigan alleging that the UAW violated Title I of the LMRDA when it eliminated Region 2 to punish the delegates who re-elected him. This action was dismissed as forbidden by Title IV of the LMRDA, and the court of appeals affirmed. 390 F.3d 908 (6th Cir. 2004).

[3] Respondents also claimed that Davis' claims relied in part on the UAW's Constitution, and hence were completely preempted by section 301 of the Labor Management Relations Act. Because the district court rejected this argument and respondents did not pursue it on appeal, it is not discussed here.

retaliation. In any event, Davis argued that even if his claims were preempted, preemption is generally a federal defense, and the state courts were fully capable of assessing that defense. Davis further explained that his defamation claims were independent of any claims he might have had that the elections at the UAW Convention were invalid. After all, election winners as well as election losers can sue over defamatory campaign statements; hence, the validity of the claims cannot depend on whether the election should be set aside.

The district court agreed that it lacked jurisdiction, and remanded to state court. Pet. App. 13a-14a, 32a. The court decided that a state claim for retaliatory elimination of an elected position, or for defamatory statements made about an elected official in the course of eliminating his position, does not necessarily arise under federal law simply because Title IV provides the exclusive procedure for challenging a union election after it has been conducted. Although respondents had argued, in part, that seeking the remedy of reinstatement showed that he was challenging an election already conducted, the district court thought that Davis had conceded that reinstatement was not available to him, which "goes a long way toward mooting [respondents'] argument." *Id.* 30a. But that was not, in the end, the basis for its decision, because the district court decided that "the nature of the relief requested by Davis, alone, does not create federal preemption jurisdiction." *Id.* Moreover, the LMRDA has an express non-preemption provision, *id.*, and does not condone age discrimination. *Id.* 32a. Finally, Davis was not challenging "the ultimate validity of any Union election results," just the means by which respondents had eliminated him. *Id.* 32a. Accordingly, there was no preemption, and "defendants' removal of the case to this Court was not well-taken." *Id.*

Respondents appealed, and Davis challenged the court of appeals' jurisdiction to hear the case, asserting that remand

to state court for lack of subject matter jurisdiction is not a permissible basis for appeal under 28 U.S.C. § 1447(d). On appeal, both parties agreed that the district court was factually incorrect in perceiving that Davis had agreed not to pursue the issue of reinstatement to the position that had been eliminated, and that, to the extent the district court had relied on that assumption in its remand decision, the reliance was erroneous. Pet. App. 7a.

The Sixth Circuit decided that, even though the district court had attributed its remand decision to the absence of jurisdiction, it would have jurisdiction to review the remand if the district court's ruling were that it had jurisdiction at time of removal, but subsequent events made remand appropriate. *Id.*, citing *First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456 (6th Cir. 2002). The district court's reference to Davis' relinquishment of his claim for reinstatement as having "mooted" one of respondents' preemption arguments was deemed sufficient to bring the case within this line of authority. Thus, in effect, the Sixth Circuit decided, appellate jurisdiction is precluded only when a district court expressly bases its decision to remand on the lack of subject matter jurisdiction at the time of removal. If the district court decided to remand because of events occurring after removal, Sixth Circuit law holds that § 1447(d) does not bar appellate review of the remand order. *Id.* 6a-7a.

Here, even though the district court had expressly stated that it lacked jurisdiction, and even though the district court's assumption about whether Davis had relinquished the claim to reinstatement was erroneous, the Sixth Circuit concluded that this mistake of fact placed the district court's remand decision within the class of decisions that are remanded based on a post-removal event having deprived the court of subject matter jurisdiction. *Id.* 7a. Accordingly, the Court decided it could review the remand decision on appeal. *Id.*

The court of appeals then turned directly to the question of whether Davis' state law claims are preempted by the LMRDA. *Id.* 8a-11a. The court did not first consider whether the district court had abused its discretion in deciding to remand. Nor did the court consider whether federal law creates a private cause of action that supersedes and supplants Davis' claims under state law, such that Davis' state law claims must be considered as arising under federal law. Instead, the court of appeals held that it was sufficient to determine that all of Davis' state law claims, for age discrimination or for libel, all hinge on whether Davis was properly elected, and whether "defendants' statements regarding the impropriety of his actions in the election were false . . .. To determine whether the statements are false, however, the validity of the election and Davis's tactics must be examined." *Id.* 10a. Because the Secretary of Labor had previously decided that the delegates' action at the convention had not violated Davis' election-related rights, Davis' state-law claims would necessarily call those findings into question, and hence were preempted by Title IV of the LMRDA. *Id.* 10-11a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to decide three persistent questions on which the lower federal courts have been deeply divided, about removal based on complete preemption and about appellate jurisdiction to review remand decisions. First, even assuming that review is ever available for decisions remanding remaining state claims after the elimination of federal claims on which removal was originally based, the lower courts are hopelessly divided about whether and how far the courts of appeals may go in second-guessing a district court's statement that its remand decision was based on lack of jurisdiction. Indeed, the Court has never decided

whether the general rule against appellate review of remand decisions, 28 U.S.C. § 1447(d), authorizes appellate jurisdiction to review remand decisions based on the statutory authority to decline supplemental jurisdiction over state law claims that were properly removed along with federal claims that were eliminated post-removal, and two Justices have noted that the question remains open.

Contrary to the apparently clear command of section 1447(d), the courts of appeals are spending an inordinate amount of time deciding whether one of the many exceptions to that subsection apply to a particular case; further, there is little consistency among the circuits on what the exceptions to the subsection are. Certiorari should be granted here to restore clarity to this area, and to reaffirm the Congressional mandate that, absent clear legislation to the contrary, states may be trusted to consider federal issues, and even if there may be federal defenses to state claims, district court decisions remanding those claims should not be reviewed on appeal.

Finally, contrary to each of the decisions of this Court in which removal has been held appropriate based on the doctrine of complete preemption, and to the holdings of most circuits, the court below joined the Seventh and Eighth Circuits, and district courts in several states, in allowing a state claim to be removed based on a federal preemption defense even though the preempting statute did not contain any federal right of action over which the district court could have had original jurisdiction. Under the holding below, removal based on preemption is proper whenever federal law bars any state regulation. Review should be granted to decide whether complete preemption can be found where there is no private cause of action within the district court's jurisdiction to which the state claims could be converted.

A. This Case Presents Important Questions About Whether, and Under What Standards, Courts of Appeals May Review District Court Remand Decisions That May Be Based on the Elimination of Claims That Were Properly Removed.

1. Background Principles Governing Appellate Jurisdiction Over Remand Orders.

Section 1447(d) provides that, except for certain civil rights cases, "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." Despite this seemingly simple command, the rule has become so hedged about with exceptions that it sometimes seems as if the rule is the exception. Further, the exceptions vary in application and content among the circuits.

This Court recognized a narrow exception to section 1447(d) in *Thermtron Prod. v. Hermansdorfer,* 423 U.S. 336 (1976), where a district judge had acknowledged that there was subject matter jurisdiction, but decided that the federal court dockets were so overcrowded that the case could be resolved more quickly if it were sent back to state court. The Court held that section 1447(d) was not intended "to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute . . .. Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447(d)." *Id.* at 351. The following year, the Court reaffirmed that **even a remand based on erroneous principles** is nevertheless

unreviewable. *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977).

Then, in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), the Court held that, despite the lack of express statutory authorization for the remand of state claims that were joined in a complaint with federal claims after the federal claims were dismissed, federal courts have inherent authority to remand such claims even though they were within the court's pendent jurisdiction. The Court did not have occasion to decide whether the court of appeals had jurisdiction to review such remand decisions, because the Court affirmed the denial of a petition for mandamus. Two years later, Congress provided express statutory authorization for supplemental jurisdiction over state-law claims that are part of the same case or controversy as other claims of which the district courts have original jurisdiction. 28 U.S.C. § 1367(a). The same statute expressly gave district courts discretion to decline supplemental jurisdiction, while enumerating four specified reasons for declining jurisdiction. 28 U.S.C. § 1367(c).

Finally, in *Things Remembered v. Petrarca*, 516 U.S. 124 (1995), the Court made clear that the remands insulated from review were not confined to those which were specified in section 1447(c). That case involved the removal of a state claim under the bankruptcy provision, 28 U.S.C. § 1452, which had its own provision for remands to state court. Concurring in the opinion of the Court, Justices Kennedy and Ginsburg stated their understanding that the Court's reliance on *Thermtron* was not intended to bear on the reviewability of *Cohill* remand orders. 516 U.S. at 129-130. Although all courts of appeals to have addressed this open question have ruled that they do have jurisdiction to decide whether supplemental jurisdiction was properly declined through a remand order, the standard by which they evaluate the propriety of remand varies among the circuits.

2. The Court Should Decide Whether There Is Appellate Jurisdiction to Second-Guess the "Real" Reasons for Remand When the District Court Finds Lack of Federal Jurisdiction.

Even if there is appellate jurisdiction to review remand orders that are issued in cases in which there was unquestionably federal jurisdiction at the time of removal, but later events have eliminated the claims that afforded a basis for the removal, this case presents two significant questions, on which the courts of appeals are divided. Both concern **how** such cases are reviewed. **First**, the courts of appeals are deeply divided on the question of whether, and to what extent, the court should "second–guess" the opinion of a district judge who has decided to remand a case for a stated reason that facially complies with section 1447(c), and determine whether the real reason for remand might have been one not within the statute, and hence subject to appellate review under *Thermtron*. The Third, Fifth and Tenth Circuits employ an approach that is deeply at odds with approaches in the Fourth, Sixth, Seventh, and Eighth Circuits.

For example, in the Fifth Circuit, "Reviewable non-section 1447(c) remands constitute a narrow class of cases, meaning we will review a remand order only if the district court 'clearly and affirmatively' relies on a non-section 1447(c) basis." *Heaton v Monogram Credit Card Bank of Georgia*, 231 F.3d 994, 997 (5th Cir. 2000), *quoting Copling v. Container Store*, 174 F.3d 590, 596 (5th Cir. 1999). Review is forbidden even if the district court states that it is remanding because a post-removal amendment destroyed its jurisdiction, and even if that statement is legally erroneous. *Tillman v. CSX Transp.*, 929 F.2d 1023, 1026-1028 (5th Cir. 1991); *accord Angelides v. Baylor College of Medicine*, 117 F.3d 833, 836 & n.3 (5th Cir.

1997). In *Heaton*, for example, the defendant argued that the record showed that the district court had jurisdiction at one time, that the district judge was really remanding pursuant to its discretionary authority under section 1367(c), and that the district court's erroneous reliance on lack of jurisdiction should not be sufficient to bar appellate review. However, the Fifth Circuit held that the conclusory statement that there was no jurisdiction was sufficient basis to deny review.

Similarly, in the Third Circuit, if the trial judge "**purports** to remand a case on § 1447(c) grounds, his order is not subject to challenge in the court of appeals, by mandamus or otherwise. . . . Our review is forestalled only when the **stated reasons** for the remand include procedural or jurisdictional defects." *Balazik v. County of Dauphin*, 44 F.3d 209, 213 (3d Cir. 1995) (punctuation and citations omitted; emphasis in original). In *Balazik*, the district judge alluded to a section 1447(c) procedural ground, but expressly refrained from relying on that ground as a basis for remand, deciding instead to remand for comity reasons. The court accepted jurisdiction for that reason only.

The Tenth Circuit's standard allows slightly more penetrating review of the stated reasons for remand: The district judge's statement that subject matter jurisdiction is lacking is not alone sufficient, but so long as the finding of lack of subject matter jurisdiction was made in good faith, that is enough to bar review under § 1447(d). *Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997).

In the Fourth Circuit, by contrast, the district court's reference to lack of jurisdiction does not end the matter; if there is any ambiguity about whether the district judge felt that a remand was compelled, the court of appeals "must . . . determine by independent review of the record" what the real basis for remand was. *Mangold v. Analytic Serv*, 77 F.3d 1442, 1450 (1996). A strong dissent argued that an express finding

that subject matter jurisdiction is lacking should be enough to bar review. *Id.* at 1455-1456. The Fifth Circuit explicitly recognized its differences with the Fourth Circuit in *Angelides v. Baylor College Of Medicine*, 117 F.3d 833, 836 (5th Cir. 1997) ("we purposefully decline to follow the Fourth Circuit's evisceration of § 1447(d) [allowing review] when a district court's remand error was of a 'sufficient magnitude.'"). But the Eighth Circuit has followed *Mangold*, holding that even a remand that is expressly based on lack of jurisdiction can be reviewed if it was based on reasons that are plainly wrong under existing circuit precedent. *Xiong v. State*, 195 F.3d 424, 426-427 (8th Cir. 1999). Similarly, in the Eighth Circuit, the district court's statement that it lacks jurisdiction will not bar review if inspection of the record reveals that the district court was "really" relying on the elimination of federal claims and thus, implicitly albeit unwittingly, on a discretionary decision to decline supplemental jurisdiction. *Lindsey v. Dillard's*, 306 F.3d 596, 598 (8th Cir. 2002). *Accord Poore v. American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1290-1291 (11th Cir. 2000). Adopting a standard comparable to these circuits, the Seventh Circuit has held that a district court's use of the term "jurisdiction" in deciding to remand is not conclusive of appellate authority to review. *Kircher v. Putnam Funds Trust*, 373 F.3d 847, 849 (7th Cir. 2004). The Seventh Circuit characterized the Second and Ninth Circuits as having held squarely to the contrary with respect to the specialized topic of removal and remand under the Securities Litigation Uniform Standards Act of 1998. *Id.* at 850-851 (Second and Ninth Circuits "were mesmerized by the word 'jurisdiction' and did not see the difference between a case that should never have

been removed and a case properly removed and remanded only when the federal job is done").[4]

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[4] A number of appeals courts also scrutinize district court decisions that on their face rest on procedural grounds and allow the appeal to proceed if they consider that section 1447(c) was incorrectly applied. Because section 1447(c) distinguishes between remands based on lack of jurisdiction, which may be ordered sua sponte, and remands based on procedural defects, which may be ordered only in response to a timely motion, the Fifth and Eleventh Circuits have decided, over dissents, that a sua sponte district court decision directing remand for lack of subject matter jurisdiction must be carefully reviewed to ensure that it is not based on a mere failure properly to plead jurisdiction in the removal notice. *In re First Nat'l Bank of Boston*, 70 F.3d 1184, 1187 (11th Cir. 1995); *In re Allstate Ins. Co.*, 8 F.3d 219, 221-222 (5th Cir. 1993). But a procedural matter that the district court notices sua sponte, albeit in response to a timely motion about a different procedural matter, is held to be outside appellate jurisdiction. *Velchez v. Carnival Corp.*, 331 F.3d 1207, 1210 (11th Cir. 2003). Complicating matters still further, the Third Circuit holds that if the district court mischaracterizes as jurisdictional an objection to removal that is actually procedural but was not presented within thirty days of removal, the court of appeals has jurisdiction to reverse the remand. *Ariel Land Owners v. Dring*, 351 F.3d 611, 613 (3d Cir. 2003). In the Ninth Circuit, the fact that the procedural reason for the remand was not raised in the district court until the reply brief is a basis for appellate jurisdiction. *Northern California Dist. Coun. of Laborers v. Pittsburg-Des Moines Steel* Co., 69 F.3d 1034, 1038 (9th Cir. 1995)

Under the standards set forth by the Third, Fifth and Tenth Circuits, the remand order here would have been unreviewable, because the district judge unequivocally stated that her court did not have jurisdiction. Although the district judge stated in passing that a statement that she mistakenly thought Davis had made in a brief had "go[ne] a long way toward mooting" one of respondents' arguments for complete preemption, Pet. App. 30a, the court did not conclude that it had jurisdiction at time of removal (which would have provided a potential basis for supplemental jurisdiction over the remaining claims). At worst, the district court found lack of jurisdiction through a mistaken understanding of the law. Another interpretation of the district court's opinion is that the district judge's mistake of fact about whether Davis had changed his prayer for relief did not affect its view of its jurisdiction. Supporting this reading are the facts that, immediately after its statement about possible "mooting," the court stated that a claim for relief could not create "federal preemption jurisdiction," *id.*; *see also id.* 13a-14a; the statement that there was "no direct conflict between federal law and the state laws allegedly violated by the defendants in the present case," *id.* 31a; and the conclusion that the "removal of the case to this Court was not well-taken." *Id.* 32a. Thus, under the Tenth Circuit's standard, the determination of lack of subject matter jurisdiction would have been made "in good faith" and remand would have been unreviewable. In apparent agreement with the Seventh Circuit, however, the Sixth Circuit refused to be "mesmerized" by the reference to jurisdiction. The Court should grant review to resolve this conflict and provide guidance to the courts of appeals on the degree of deference to be given to the district court's stated reasons for the remand in deciding whether jurisdiction is available under section 1447(d).

3. The Court Should Decide Whether Section 1447(d) Forbids Review of Remand Decisions That Decline Jurisdiction As Expressly Authorized by Section 1367(c).

The Court should also resolve the question, left open in both *Cohill* and *Things Remembered*, whether there is appellate jurisdiction to review orders remanding to state court state law claims that were filed along with federal law claims, following the dismissal of claims over which there was at least arguably original jurisdiction, and over which the district courts had supplemental jurisdiction under Section 1367(a). The reason for limiting § 1447(d) in *Thermtron* was to give the courts of appeals the authority to rein in "rogue" decisions by district judges who remand cases to state court without any statutory authority. In other circumstances, when remands are fully supported by statutory authority, a ban on appellate review limits both the needless imposition on the power of the sovereign states to afford a local forum for their citizens who suffer wrongs under state law, and the avoidable delays in the litigation of those state-law issues when the decision to remand is appealed. These considerations apply equally to remands of state law issues under § 1367(c), especially when it is only one small aspect of the case that the district court deemed federal and whose elimination from the case destroyed the original basis for removal. Here, even reading the district court's decision as the court of appeals did, the district judge considered that one aspect of the relief sought on one cause of action – the prayer for reinstatement – presented a stronger argument for removal than several other claims that the district court expressly held provided no basis for removal.

Since *Cohill* was decided, Congress has given district courts express authority for the remand of state law claims that

remain in a case after the federal claims have been dismissed. Although the courts of appeals have generally concluded that they have jurisdiction to review remand decisions that are based on section 1367(c) once the admittedly federal claims on which removal was based have been removed from the case, *e.g., In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708-09 (7th Cir. 1992); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 223 (3d Cir. 1995), some courts of appeals have construed *Thermtron* to forbid appellate review of remands based on statutory authority other than section 1447(c). For example, many courts of appeals agree that section 1447(d) extends to prohibit review of remands pursuant to 28 U.S.C. § 1447(e) as well as section 1447(c). *E.g., Stevens v. Brink's Home Security*, 378 F.3d 944, 948 (9th Cir. 2004); *Matter of Florida Wire & Cable Co.*, 102 F.3d 866, 868 (7th Cir. 1996). ("The Court's opinion in *Things Remembered*, as well as Justice White's dissenting opinion in *Cohill*, make it clear that the important distinction is between remand orders authorized by statute, which are nonreviewable, and those that are not, which are reviewable."). Similarly, the majority rule bars review of remands based on 28 U.S.C. § 1445, *New v. Sports & Recreation,* 114 F.3d 1092, 1095-1097 (11th Cir.1997) (no appellate jurisdiction to review remands based on section 1445(c)); *In re CSAX Transp*, 151 F3d 164, 167 (4th Cir. 1998) (agreeing that section 1445(a) remands can ordinarily not be reviewed on appeal, but allowing appeal because the remand was based on reasons about the application of the FELA that are seriously wrong), although the Fifth Circuit view is to the contrary. *In re Excel. Corp.*, 106 F.3d 1197, 1200 (5th Cir. 1997) (section 1445(c) remands may be reviewed under *Thermtron* which bars review only if based on section 1447(c)). These decisions support the contention that section 1447(d) is not limited to protecting against review of remands under only

one small subsection of the Congressional scheme governing removal and remand.

Moreover, the fact that some circuits have concluded that they need to decide whether the district court was really thinking about a post-removal event in deciding whether there is subject matter jurisdiction, and thus whether they have jurisdiction to review the remand decision, *see* pages 11-12, *supra*, discussing *Dillard's* and *Poore*, has added to the needless complications that have come to attend the determination of whether section 1447(d) bars appellate review. Yet if this Court were to rule that remands following the elimination of the claims over which there was subject matter jurisdiction at the time of removal are **also** authorized by statute, the animating concerns behind *Thermtron* would not require any exception to section 1447(d). For this reason alone, the Court should grant certiorari to decide whether remands pursuant to the statutory authorization provided by section 1367(c) are subject to appellate review or whether they stand on the same footing under section 1447(d) as remands pursuant to the statutory authorizations provided by section 1447(c) and other remand statutes.[5]

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[5]Even assuming that jurisdiction to review the remand order was appropriate under section 1367(c), because the remand was based on the purported relinquishment of the "reinstatement" claim, almost every circuit has held that because section 1367(c) states that a district court "may" remand for one of several reasons, such remand decisions are discretionary, and hence appellate review is only for abuse of discretion. *Hinson v. Norwest Financial South Carolina*, 239 F.3d 611, 617 (4th Cir. 2001); *Giles v NYLCare Health Plans*, 172 F.3d 332, 339 (5th Cir. 1999); *Executive Software v. United*

(continued...)

* * *

Since *Thermtron* and *Cohill* were decided, there has been a steady increase in the number of appeals from remands to state court, requiring the courts of appeals to decide whether section 1447(d) bars review in the circumstances of the particular case. A Westlaw search identified 250 cases in the past ten years in which courts of appeals had to construe and apply section 1447(d). Among the reported cases, the **majority** of cases allowed review; even counting the unreported cases, more than 40 percent of the appealed remands were found to be within the court's appellate jurisdiction.[6] Although it cannot yet be said that section 1447(d) states the exception rather than the rule, at the very least it is clear that instead of the express bar against remands that section 1447(d) would appear on its face to represent, the courts of appeals are burdened with an uncertain standard that must be applied to the facts of each case while the litigants wait to learn whether state law claims will be decided in a state or federal forum. The Court should grant

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[5](...continued)
States District Court, 24 F.3d 1545, 1556-1557 (9th Cir. 1994); *In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304 (8th Cir. 1994). Without any attention to the standard of review, however, the court below plunged directly into a de novo review of the remand decision and the district court's analysis of the preemption issues that were presented by the remanded claims.

[6]Out of 148 reported decisions since 1995 addressing the propriety of hearing an appeal from a remand order (not involving removal under section 1443), review was found proper in 83 cases. Among the 102 unreported decisions, 19 cases were found to be within the court of appeals' jurisdiction.

review to decide whether this class of appeals should be eliminated altogether, because § 1447(d) bars review of statutory remands under § 1367(c), or at least to clarify the circumstances in which such remands can be reviewed, by insisting on an abuse of discretion standard and adopting the majority rule that when a district judge states a reason for remand that is facially authorized by section 1447(c), the courts of appeals should investigate no further to determine the "real" reason for the remand.

B. Review Should Be Granted to Decide Whether a Federal Statute Can "Completely Preempt" a State Claim, Thus Transforming It Into a Federal Claim That Can Be Removed From State Court, Where the Federal Statute Does Not Afford a Private Right of Action Within the District Court's Original Jurisdiction.

The decision below deepens the conflict among the lower courts about the kinds of federal laws that provide a basis for "complete preemption" of state law claims, and thus can make state claims removable to federal court.

The normal rule is that the existence of a federal-law defense to a state-law claim, including the defense of preemption, does not cause the state-law claim to arise under federal law, and hence is neither a basis for filing the claim in federal court under federal question jurisdiction nor for removing the claim to federal court. *Caterpillar v. Williams*, 482 U.S. 386, 393 (1987); *Franchise Tax Bd. v . Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). The Court has, however, identified a handful of federal preemption defenses as being so powerful that they not only extinguish state law claims, but transform them into federal-law claims that can,

therefore, be removed to federal court. *Avco Corp. v. Machinists Lodge 735*, 390 U.S. 557 (1968). "Thus, a state claim may be removed to federal court in only two circumstances – when Congress expressly so provides, such as in the Price-Anderson Act, or when a federal statute wholly displaces the state-law cause of action through complete preemption." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). Complete preemption is a very narrow exception to the rule that preemption is only a defense that does not warrant removal, *id.* at 5; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987) (concurring opinion), and this Court has identified only three federal preemption defenses that rise to this level – preemption by section 301 of the Labor Management Relations Act ("LMRA"), *Avco*, *supra*, preemption by sections 85 and 86 of the National Bank Act, *Beneficial, supra*; and preemption by section 502 of the Employee Retirement Income Security Act (ERISA"). *Metropolitan Life, supra.*

In seeking to identify the essential characteristics that confine complete preemption claims to a narrow class of cases, several lower courts have held that a federal statute cannot be completely preemptive if Congress did not create a federal, private cause of action that it intended to substitute for a state cause of action. *E.g.*, *Briarpatch Ltd. v. Phoenix Pictures*, 373 F.3d 296, 304-405 (2d Cir. 2004) (Copyright Act); *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 775 (5th Cir. 2003) (Carmack Amendment); *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 839 (9th Cir. 2004) (Telecommunications Act of 1996); *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002) (Airline Deregulation Act); *Williams v. Midwest Express Airlines*, 315 F. Supp.2d 975, 979 (E.D. Wis. 2004) (same); *Burton v. Southwood Door Co.*, 305 F. Supp.2d 629, 637-638 (S.D. Miss. 2003) (Federal Omnibus Transportation Employee Testing

Act). Similarly, in the ERISA context, courts routinely held that, because "a vital feature for complete preemption is the existence of a federal cause of action that replaces the state cause of action," complete preemption extends only to claims for relief that could have been sought under ERISA section 502, *King v. Marriott Int'l*, 337 F.3d 421, 425 (4th Cir. 2003), and that the state plaintiff would have had standing to file under section 502. *Pascack Valley Hospital v. Local 464A UFCW Welfare Reimb. Plan*, 388 F.3d 393, 400 (3d Cir. 2004); *Felix v. Lucent Technologies*, 387 F.3d 1146, 1158 (10th Cir. 2004)

The fact that the federal statute may give regulatory authority to a federal agency, which in turn has the authority to institute an enforcement proceeding in district court, does not mean that the enforcement scheme completely preempts state claims, even if the regulatory scheme is established as the exclusive means of enforcement in the area. *Opera Plaza v. Hoang, supra*, 376 F.3d at 838-839; *Schmeling v. NORDAM*, 97 F.3d 1336, 1342-1344 (10th Cir. 1996). *See also Lontz v. Tharp*, — F.3d —, 2005 WL 1539282 (5th Cir., July 1, 2005), at *5-*6. Otherwise, every case of claimed "field preemption" could support removal of the allegedly preempted state claims to federal court. But complete preemption is not "a crude measure of the breadth of the preemption (in the ordinary sense) of a state law by a federal law, but rather . . . a description of the specific situation in which a federal law not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action, thereby manifesting Congress's intent to permit removal." *Id.* at 1342, *quoted in Lucent Technologies, supra*, 387 F.3d at 1156-1157.

Such decisions comport with the theoretical basis for the doctrine of complete preemption – that Congress has created a cause of action that actually displaces the state cause of action and "converts it" into the federal cause of action that is within the district court's original jurisdiction. *Aetna Health v. Davila*,

542 U.S. 200, 124 S. Ct. 2488, 2496 (2004). Moreover, each of the federal statutes that this Court has found to completely preempt state claims does, in fact, create a cause of action litigable in federal court that the plaintiff could have had standing to bring.[7]

There are, however, several lower court decisions which, in accord with the Sixth Circuit's decision below (although in conflict with other federal courts), have found complete preemption by certain federal statutes that do not create such a cause of action over which district courts would have had original jurisdiction. For example, the Eighth Circuit has held that the Railway Labor Act ("RLA") preempts some state claims that are arguably based on an interpretation of a collective bargaining agreement ("CBA") in the railway or airline industries, even though the statute does not create a federal cause of action. *Deford v. Soo Line*, 867 F.2d 1080, 1086 (8th Cir. 1989). *See also, e.g., Anderson v. American Airlines*, 2 F.3d 590, 595 (8th Cir. 1993) (RLA can completely preempt, but removal reversed because particular state claims at issue did not require interpretation of CBA). Many other circuits, however, hold that the RLA does not completely preempt state law claims, reasoning that, unlike the LMRA, the RLA does not create a federal cause of action to enforce

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[7]In very special circumstances not applicable here, a federal court may have federal question jurisdiction over a state law claim that depends on the construction of a federal statute that does not itself create a cause of action, where the federal interest in providing jurisdiction is strong enough to warrant such jurisdiction. *Grable & Sons Metal Prods. v. Darue Engineering & Mfg.*, 125 S. Ct. 2363 (2005). However, in a *Grable*-type case, the federal interest does not displace the state claim and warrant a finding of complete preemption.

contracts. *E.g.*, *Geddes v. American Airlines*, 321 F.3d 1349, 1354-1355 (11th Cir. 2003); *Railway Labor Execs Ass'n v. Pittburgh & Lake Erie RR Co.*, 858 F.2d 936, 942 (3d Cir. 1988); *Price v. PSA*, 829 F.2d 871, 876 (9th Cir. 1987).

Similarly, the Seventh Circuit has held that even for claims on which the Federal Communication Act ("FCA") does not create a federal cause of action, the FCA provision that "no State or local government shall have any authority to regulate," 47 U.S.C. § 332(c)(3), is sufficient to show Congressional intention to authorize complete preemption, *Bastien v. AT & T Wireless Services*, Inc., 205 F.3d 983, 986-987 (7th Cir.2000), and some district courts have agreed. *E.g.*, *Philips v AT&T Wireless*, 2004 WL 1737385 (S.D. Iowa, July 29, 2004); *Vermont v. Oncor Communications,* 166 F.R.D. 313, 318-319 (D. Vt. 1996). Most lower courts, however, hold that the FCA's restrictions on state regulation of rates and services of telephone companies do not completely preempt all state suits about such matters. *E.g., Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir.1998); *In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 343 F. Supp.2d 838, 845 (W.D. Mo. 2004); *Bryceland v. AT & T Corp.*, 122 F. Supp.2d 703, 707-709 (N.D. Tex. 2000); *Bauchelle v. ATT Corp.*, 989 F. Supp. 636, 644-646 (D.N.J. 1997).

Similarly in this case, the Sixth Circuit upheld removal based on preemption by a federal statute that does not provide any cause of action for individual union members that might displace a state claim and convert it into a federal claim within the district court's original jurisdiction. At most, an individual member can file an administrative complaint with the Secretary of Labor, and the Secretary will take enforcement action if she finds a violation of Title IV. Far from finding that Title IV of the LMRDA supplants Davis' state claims with federal claims of which the district court had subject matter jurisdiction, the court below directed that the district court dismiss those claims

for **lack** of subject matter jurisdiction. Pet. App. 10a. Thus, the decision below deepens the conflict among the lower courts about whether a federal statute can completely preempt state claims without providing a cause of action that the plaintiff could have brought in federal court in the first instance.

Even in terms of ordinary conflict preemption (as opposed to complete preemption), the Sixth Circuit's preemption holdings are dubious, because this Court has held that Title IV does not preclude the enforcement of other statutes that could make the rules governing elections illegal. *Steelworkers v. Sadlowski*, 457 U.S. 102, 117 n.10 (1982). Moreover, Davis' claims are not directed at overturning the votes that were held to determine which candidates would fill the positions that were created after his position was abolished – he objects to the decision to redistrict his position out of existence, which he claims was done for a discriminatory purpose, and to defamatory comments about him that were made to encourage delegates to vote to abolish that position. Although preemption principles no doubt require that *New York Times* standards be applied to his defamation claims, *Linn v. Plant Guards Local 114*, 383 US 53, 64-65 (1966), this Court has refused to hold that the mere fact that statements were made in the course of a labor controversy bars any and all enforcement of state libel laws, regardless of the presence of actual malice and actual damage. *Id.* Nor has any other lower court so held. And the limited nature of Davis' administrative remedy bars the application of collateral estoppel to prevent Davis from bringing state law claims that might call into question the findings about respondents' statements that supported the Secretary's decision not to find any violation of Title IV. Indeed, in union elections as in other labor disputes, claimed false or even malicious campaign statements about the contending parties are not a basis for overturning the election. They may, however, form the basis for a libel suit.

In any event, neither the Secretary's exclusive power under 29 U.S.C. § 483 to set aside a union election that has already been conducted, nor the Secretary's finding that Title IV was violated, provides a basis for **complete** preemption of Davis' state law age discrimination and defamation claims. The Court should grant review to decide whether a statute such as Title IV of the LMRDA, which does not provide any federal, private right of action for litigants like Davis, can completely preempt state claims and hence afford a basis for removal of those claims from state court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 15, 2005

APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 04a0432p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WARREN DAVIS,

Plaintiff-Appellee,

v. No.04-3131

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW); UAW REGION 2B; RONALD GETTELFINGER; and LLOYD MAHAFFEY,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 03-01311—Kathleen McDonald O'Malley, District Judge.
Argued: September 22, 2004
Decided and Filed: December 15, 2004
Before: KEITH, MOORE, and GILMAN, Circuit Judges.

OPINION

RONALD LEE GILMAN, Circuit Judge. At the 2002 Constitutional Convention of the International Union of the United Automobile Workers of America (UAW), convention delegates adopted an amendment to the UAW Constitution that dissolved one of the UAW's geographic regions and redistributed its members among three neighboring regions. The amendment also had the effect of setting aside Warren Davis's reelection as a regional director, a result that Davis contends was motivated by illegal age discrimination. Davis therefore sued the UAW and two of its officers, Ronald Gettelfinger and Lloyd Mahaffey, in Ohio state court, alleging state-law claims of age discrimination, conspiracy to discriminate on the basis of age, wrongful discharge, retaliation, libel, and slander.

The UAW removed the case to the United States District Court for the Northern District of Ohio, asserting that Davis's state-law claims sought postelection relief and were therefore preempted by Title IV of the federal Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 481-83 (2004). Finding that there was no federal preemption, the district court remanded the case to the Ohio state court. For the reasons set forth below, we **REVERSE** the district court's remand of Davis's state-law claims and **REMAND** with instructions to dismiss the claims on the basis that they are all precluded by the LMRDA.

I. BACKGROUND

A. Factual background

Davis served for 19 years as an elected member of the governing board of the UAW. After deciding to run for

Congress in 2002, Davis announced his intention to vacate his office in the UAW and endorsed his assistant director for his soon-to-be-vacant position. The election for the office, for which Davis's assistant was the sole candidate, was held at the UAW's Constitutional Convention in June of 2002. Due to an apparent last-minute change of heart, however, Davis arranged for his assistant to nominate Davis and then withdraw from the race, resulting in Davis winning the election unopposed.

During his many years of service with the UAW, Davis had been part of an unofficial caucus of politically powerful members who adhered to an informal agreement not to seek elective office after reaching 65 years of age. Angered by Davis's surprise tactics at the convention and his acceptance of an elected position at the age of 67, several members of the unofficial caucus issued a press release calling upon the UAW convention delegates to eliminate Davis's region, redistribute its members among three other regions, and hold new elections. This proposal was adopted by the UAW Constitutional Convention, which promptly dissolved Davis's region the day after his reelection.

B. Procedural background

Davis sued the UAW in the United States District Court for the Eastern District of Michigan, alleging a number of federal claims related to the UAW's elimination of his region and the resulting termination of his elected office. *Davis v. UAW,* 274 F. Supp. 2d 922 (E.D. Mich. 2003). The court dismissed the case after finding that it lacked subject matter jurisdiction over Davis's election-related claims because there had been no finding of probable cause by the Secretary of Labor as required by

Title IV of the LMRDA, 29 U.S.C. §§ 481-83. The Michigan district court's dismissal of Davis's case was upheld by this court on appeal. *Davis v. UAW*, 2004 WL 2812623 (6th Cir. Dec. 9, 2004).

In the present action, Davis has sued the UAW and two of its officers in Ohio state court, advancing state-law claims of age discrimination, conspiracy to discriminate on the basis of age, wrongful discharge, retaliation, libel, and slander, all arising out of the events at the Convention. These state-law causes of action are premised on the assertion in his complaint that he "was successfully elected as Director" at the UAW Convention and that the UAW's subsequent actions in reorganizing his region improperly deprived him of his rightful office.

The UAW removed the case to the district court, offering two separate grounds in support of removal. First, the UAW contended that, in deciding Davis's state-law claims, the court would be required to interpret the UAW Constitution, thus making the action completely preempted by the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (2004). Second, the UAW asserted that the adjudication of Davis's state-law claims would necessarily require a determination regarding the validity of the UAW election, an exclusively federal question under Title IV of the LMRDA.

The district court remanded the action to the state court after concluding that it lacked subject matter jurisdiction over the case. In so doing, it found that the UAW's federal preemption claims based on the LMRA were without merit, a decision that the UAW has not challenged on appeal. The district court also rejected the UAW's contention that Davis's state-law claims were preempted by Title IV of the LMRDA, causing it to remand

the case back to the state trial court. This timely appeal followed.

II. ANALYSIS

A. Jurisdiction to review the district court's remand order.

A threshold question in this case is whether appellate jurisdiction exists to review the remand order of the district court. As a general rule, remand orders constitute final judgments for purposes of federal appellate jurisdiction and may be reviewed unless some independent bar to appellate review exists. *Quakenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (establishing that remand orders are "immediately appealable under §1291 because they conclusively determine a disputed question that is completely separate from the merits of the action") (quotation marks omitted).

Davis contends that we are barred by 28 U.S.C. § 1447(d) from hearing the UAW's appeal from the district court's remand order. Section 1447(d) states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." Despite the sweeping language of this section, however, "[t]he Supreme Court stated long ago . . . that the § 1447(d) proscription is not as broad as it seems." *Baldridge v. Kentucky-Ohio Trans., Inc.*, 983 F.2d 1341, 1343 (6th Cir. 1993).

One significant limitation on the reach of § 1447(d) was explored by this court in *Long v. Bando Manufacturing of America, Inc.*, 201 F.3d 754 (6th Cir. 2000), where appellate review of a remand order was sought. Although acknowledging that "the plain language of 28 U.S.C. §

1447(d) suggests that remand orders concerning cases removed pursuant to 28 U.S.C. § 1441 are never reviewable," *Long*, 201 F.3d at 758, this court concluded that the Supreme Court's ruling in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), dictated that "§§ 1447 (c) and (d) must be read together . . . ." *Long*, 201 F.3d at 758. Section 1447 (c) directs the district court to remand a removed case "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction . . . ." After reading § 1447(c) in conjunction with (c) the court in *Long* concluded "that § 1447(d) prohibits review only of remand orders issued pursuant to a finding, under § 1447(c) that the district court lacked subject matter jurisdiction." 201 F.3d at 758.

In determining "the nature and scope of" remand under §1447(c), this court has "interpreted that provision as necessarily tied to a temporal reference point, namely, the time of removal." *Van Meter v. State Farm Fire & Cas. Co.*,1 F.3d 445, 450 (6th Cir. 1993). For a case to be deemed remanded pursuant to § 1447(c), the district court must find that subject matter jurisdiction was lacking at the time of removal and then remand on that basis; otherwise, § 1447(d) will not prohibit appellate review of the district court's remand order. *See First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456, 460 (6th Cir. 2002) (stating that "§ 1447(d) means only that a remand order is unreviewable on appeal when the case was remanded based on the district court's conclusion that it lacked subject matter jurisdiction over the removed case at the time of removal") (emphasis in original). Where a district court had proper jurisdiction at the time of removal, but events occurring after removal make remand to the state courts appropriate, § 1447(d) does not bar appellate review of the district court's remand order. *See Letherer v. Alder Group, LLC*, 328 F.3d 262 (6th Cir.

2003) (exercising appellate review where the district court remanded after concluding that a stipulation between the parties had obviated the need to address the federal question); *First Nat'l Bank of Pulaski*, 301 F.3d at 459 (reviewing a remand order where the district court had resolved the federal claims and then remanded the case after finding that it "lacked jurisdiction to adjudicate the remaining state claims").

We conclude that § 1447(d) does not bar our appellate review of the remand order in the present case because the district court possessed subject matter jurisdiction *at the time of removal*. The UAW removed this case to the district court, arguing that there was federal question jurisdiction over Davis's claim for reinstatement because the claim constituted a request for postelection relief under the exclusive jurisdiction of the LMRDA. Only after finding that Davis had "conceded] that the remedy of reinstatement [was not available to him" did the district court conclude that the case must be remanded because subject matter jurisdiction had been lost. The district court found that Davis had expressed his intent to abandon this claim in his memorandum supporting his remand motion, which was filed over a month after the case was removed from the state court.

On this point the district court may have been mistaken, however, because Davis did not amend his complaint to remove his claim for reinstatement and has made clear his intention to preserve the claim. Regardless, the district court plainly relied on Davis's alleged concession in remanding the case, finding that it "goes a long way toward mooting the defendants' argument" of preemption by the LMRDA. Because the district court remanded this case only after finding that a post-removal event had deprived it of subject matter jurisdiction, we may

exercise appellate jurisdiction over the district court's remand order. *See First Nat'l Bank of Pulaski*, 301 F.3d at 460 (stating that "a remand order is reviewable on appeal when the district court concludes that the action was properly removed but that the court lost subject matter jurisdiction at some point post-removal").

B. Federal preemption by Title IV of the LMRDA

1. Davis's state-law claims for age discrimination, conspiracy, wrongful termination, and retaliation

The UAW contends that remand was improper because Davis's complaint raised exclusively federal questions regarding the validity of the union election, the UAW's tactics therein, and the appropriateness of Davis's reinstatement as a remedy. Specifically, the UAW argues that Davis's claims of age discrimination, conspiracy, wrongful termination, and retaliation all seek postelection relief. Title IV of the LMRDA mandates that challenges to a previously conducted union election may only be brought by the Secretary of Labor. 29 U.S.C. § 483; *Trbovich v. United Mine Workers*, 404 U.S. 528, 533 (1972).

The district court's application of the LMRDA is reviewed de novo. *Argentine v. United Steel Workers, AFL-CIO*, 287 F.3d 476, 482 (6th Cir. 2002). In remanding the present action, the district court concluded that Davis's claims were not preempted by the LMRDA because the indisputably federal questions of "whether Davis was elected" and "whether the defendants eliminated Davis's position" need not be answered in order to adjudicate Davis's claims. We respectfully disagree. For instance, it is difficult to imagine how the state court could adjudicate whether Davis was wrongfully terminated without first

finding that he held a position in the UAW. This apparent difficulty is confirmed by the fact that the district court felt compelled to address the validity of the UAW election in its remand order, noting that "the Union does not seriously assert that Davis was not elected" and that "the defendants have never denied (and have no basis for denying) that Davis was elected pursuant to a regular and orderly process provided for under the Union Constitution." To the contrary, the UAW vigorously contests the validity of Davis's election.

We agree with the district court's conclusion that the preemptive scope of the LMRDA is narrow but disagree that Davis's claims are not within that narrow scope. For example, the district court held that Davis's request for damages in the form of back pay "would not necessarily imply, as defendants assert, that one or more of the Union's election results were invalid." But the cases relied upon by the district court do no more than support the proposition that the LMRDA permits an employee to file an age discrimination claim for back wages when improperly *discharged* by the union; they offer no authority for the court's holding that an employee is not preempted when filing a similar claim in the context of an allegedly unfair union *election*.

Conversely, the two other courts that have addressed this issue in the context of a union election have held that the LMRDA preempts such a claim because "[p]laintiffs can only prevail on . . . the claim for back pay[] if the court determines that the election was improper." *Calciano v. United Bhd. of Carpenters & Joiners*, No. 92-5715, 1993 WL 138827 at *4 (S.D.N.Y. Apr. 23, 1993); *see also Bermingham v. Castro*, No. 98-15859, 1999 WL 644342 at *2 (9th Cir. Aug. 24, 1999) (holding that damages in the form of "lost income . . .effectively challenge the validity of

the election already conducted, which is an area in which Title IV provides the exclusive remedy").

Davis's state-law claims in question, including his requested remedy of back pay, logically hinge on his assertion that he was lawfully elected. As the district court in Michigan correctly concluded, claims for postelection relief are relegated to the exclusive jurisdiction of the Secretary of Labor by the LMRDA. *Davis v. UAW*, 2004 WL 2812623 (6th Cir. Dec. 9, 2004). Davis's claims for age discrimination, conspiracy, wrongful termination, and retaliation should therefore be dismissed by the district court for lack of subject matter jurisdiction.

2. Davis's state-law claims for libel and slander

Davis's remaining causes of action for libel and slander arise from a press release issued at the UAW Convention, wherein certain delegates alleged that Davis lied about his plans for retirement and employed an "immoral, deliberate, and fraudulent scheme to deny an honest election to the membership." Similar sentiments were also vocalized by some of the delegates shortly after the election.

In order for Davis to establish a prima facie case for libel or slander, he must show that the delegates' statements regarding the impropriety of his actions in the election were false. *See Celebrezze v. Dayton Newspapers, Inc.*, 535 N.E.2d 755, 759 (Ohio Ct. App. 1988) (holding that falsity is an essential element of an Ohio common law defamation claim). To determine whether the statements are false, however, the validity of the election and Davis's tactics therein must be examined.

But this inquiry has already been conducted by the Secretary of Labor in responding to Davis's Title IV

complaint. After acknowledging that some delegates had "privately published and distributed a pamphlet condemning [Davis's] stratagem and purposes," the Secretary nevertheless found that the delegates' actions at the Convention had not violated Davis's election-related rights. Because Davis's claims for libel and slander would necessarily require a court to revisit this finding, these claims are also preempted by Title IV of the LMRDA. *Cf. Henegar v. Banta*, 27 F.3d 223, 226-27 (6th Cir. 1994) (holding that the Railway Labor Act "preempts state law claims based on libel and slander" because the "court would inevitably have to interpret the terms of the collective bargaining agreement," a task within the exclusive jurisdiction of the National Railroad Adjustment Board); *Miller v. Norfolk & W. Ry.* Co., No. 89-4101, 1990 WL 163302, at *5 (6th Cir. Oct. 25, 1990) (unpublished) (finding libel and slander claims preempted by the Railway Labor Act where, "[a]lthough defamation was not an issue before the [administrative] board," the defamation claim was "based upon a matrix of facts that [was inextricably intertwined with the collective bargaining agreement").

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the district court's remand of Davis's state-law claims and **REMAND** with instructions to dismiss the claims on the basis that they are precluded by the LMRDA.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WARREN DAVIS,	:	**Case No. 1:03CV1311**
	:	
Plaintiff,	:	**JUDGE**
	:	**O'MALLEY**
	:	
v.	:	**MEMORANDUM &**
	:	**ORDER**
UNITED	:	
AUTOMOBILE,	:	
AEROSPACE AND	:	
AGRICULTURAL	:	
IMPLEMENT	:	
WORKERS OF	:	
AMERICA, et al.,	:	
	:	
Defendant.	:	

Plaintiff Warren Davis originally filed this action in state court against the following defendants: (1) United Automobile, Aerospace and Agricultural Implement Workers of America ("the Union"); (2) Region 2B of the Union ("Region 2B"); (3) Union President Ronald Gettelfinger; and (4) Region 2B Director Lloyd Mahaffey. In his complaint, Davis alleges that, in 1983, he was elected to the position of Director of Region 2. Davis further alleges that the UAW has an unwritten rule that a person may not hold the position of Director after age 65. Davis decided not to adhere to this rule, and ran for re-election in June of 2002, even though he was older than 65. Davis won the election. Davis alleges that the defendants

then punished him for violating the age rule. Davis alleges this punishment came primarily in two forms: (1) the defendants broke up Region 2, distributed its members to other regions (including Region 2B), and eliminated the position of Director of Region 2; and (2) the defendants issued a defamatory press release, attacking Davis and seeking to lower his reputation with Union members. Davis also alleges the defendants took these actions in retaliation for Davis's having urged other Union members to disregard the unwritten age rule.

Based on these allegations, Davis stated the following claims: (1) age discrimination, in violation of Ohio Rev. Code §4112.02; (2) wrongful discharge, in violation of Ohio public policy; (3) libel; (4) defamation; (5) retaliation, in violation Ohio Rev. Code §4112.02; and (6) conspiracy to discriminate on the basis of age.

Currently pending are the following motions: (1) motion by defendants to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted (docket no. 5); (2) defendants' motion to transfer venue to the United States District Court for the Eastern District of Michigan (docket no. 6); and (3) motion by Davis to remand (docket no. 12). For the reasons stated below, the motion to remand is **GRANTED**, and this case is **REMANDED** to the Cuyahoga County, Ohio Court of Common Pleas, where it was originally filed. Given that the Court concludes it

does not have jurisdiction over the case, the Court does not rule on the other motions, leaving them for the state court.[1]

I.

In his motion to remand, Davis boils his complaint down to its essence in two paragraphs, as follows:

> Plaintiff Warren Davis was a member of UAW since 1954, and became the Director of Region 2, and elected position, in 1983. Pursuant to UAW rule and custom, Plaintiff was expected to retire at age sixty-five. This policy is a blatant violation of Ohio law, and federal law, prohibiting discrimination on the basis of age. Plaintiff declined to retire, ran for re-election, and was re-elected by popular vote to the Region 2 Director position.
>
> Thereafter, the named Defendant publicly chastised Mr. Davis because of his refusal to leave quietly at age sixty-five, and vocally defended their unlawful policy of seeking "new and fresh" leadership, meaning persons under age sixty-five. Ultimately, Defendants eliminated Plaintiff's position by eliminating Region 2

[1]The Court does note, however, that the basis for defendants/ motion to transfer venue has become virtually moot, as the"related case"pending in the United States District Court for the Eastern District of Michigan has been dismissed. The dismissal is currently on appeal.

> entirely; Defendants also made defamatory statements during and *after* their campaign to get rid of Mr. Davis.

Memo. In support at 1 (emphasis in original). Davis then explains that, even though the defendants's actions allegedly violated "Ohio law, *and federal law*, prohibiting discrimination on the basis of age," he chose to state "six causes of action, all of which are based state law," and not to state any federal law claims. *Id.* (emphasis added).

Despite Davis's choice to bring only state-law claims, the defendants removed the action to this Court. Defendants give two reasons why this case is properly removed to this court. First, defendants assert that "adjudication of Davis'[s] claims implicate and will require substantial interpretation of numerous provisions of UAW's Constitution, making this action one that is completely preempted by LMRA Section 301 and thus properly removable." Response at vi (citing Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185. Second, defendants assert that "Title IV of the Labor-Management Reporting and Disclosure Act ["LMRDA"], 29 U.S.C. §§481-483, completely preempts Davis'[s] claim for installation in elective union office, the pay and benefits incident to that office, and the invalidation of conflicting results in other union elections." *Id.* The Court examines these two arguments separately.

A. LMRA Preemption.

As defendants note, LMRA "preempts state law rules that substantially implicate the meaning of collective bargaining agreement terms." *DeCoe v. General Motors*

Corp., 32 F.3d 212, 216 (6th Cir.1994). Under the principle of LMRA preemption, "a suit in state court alleging a violation of a provision of a labor contract must be brought under §301 and be resolved by reference to federal law." *Id.* (quoting *Allis-Charmers Corp.v. Lueck*, 471 U.S. 202, 210 (1985)). To determine whether a plaintiff's state law claims are, in fact, subject to LMRA preemption, this Court must take a two-step approach:

> First, the district court must examine whether proof of the state law claim requires interpretation of collective bargaining agreement terms. Second, the court must ascertain whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law. If the right both is borne of state law and does not invoke contract interpretation, then there is no preemption. However, if neither or only one criterion is satisfied, section 301 preemption is warranted.

Id. (citations omitted). Further, "[i]n order to make the first determination, the court is not bound by the 'well-pleaded complaint' rule, but rather, looks to the essence of the plaintiff's claim, in order to determine whether the plaintiff is attempting to disguise what is essentially a contract claim as a tort." *Id.* (citation omitted). If the plaintiff can prove all of the elements of his claim without the necessity of contract interpretation, then his claim is independent of the labor agreement. *Dougherty v. Parsec, Inc.*, 872 F.2d 766, 770 (6th Cir. 1989). "[N]either a tangential relationship to the CBA nor the defendant's assertion of the contract as an affirmative defense will turn

an otherwise independent claim into a claim dependent on the labor contract." *DeCoe,* 32 F.3d at 216 (citation omitted).[2] When undertaking this analysis, the Court must strictly construe the notice of removal and resolve all doubts against removal. *Her Majesty the Queen in Right of Province of Ontario v. City of Detroit*, 874 F.2d 332,339 (6th) Cir.1989). In addition, "[t]he party seeking removal bears the burden of establishing its right thereto." *Id.* (citing *Wilson 339 v. Republic Iron & Steel Co.,* 257 U.S. 92, 97-98 (1921).

In this case, the defendants recite four different reasons why the Court will have to interpret the Union Constitution in order to dispose of Davis's claims. First, the Court will have to examine the Constitution to determine whether Davis was "properly elected" to the position of Director of Region 2. Second, the Court will have to examine the Constitution to determine whether Davis is a "bona fide executive or high policymaker," "which could exempt him from protection under the Ohio

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[2]In this case, the defendants premise their LMRA preemption arguments not on the implication of the meaning of a *collective bargaining agreement*, but on the implication of the meaning of the *Union Constitution*. The LMRA preemption analysis, however, remains the same. *See United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada, AFL CIO v. Local 334, United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada*, 452 U.S. 615 (1981) (holding that a dispute implicating a union constitution could be subject to LMRA preemption); *Wooddell v. International Broth. Of Elec. Workers, Local 71,* 502 U.S. 93 (1991) (holding that a claim by a union member that union officers violated the union's constitution could be subject to LMRA preemption).

Age Discrimination statute. Third, the Court will have to determine whether the defendants' allegedly defamatory remarks were privileged by the "free speech clause" contained in the Union's ethical code. And fourth, the Court will have to examine the Constitution to determine whether Davis is entitled to reinstatement, which he requests in his prayer for relief. As explained below, the Court disagrees with the defendants on each count – none of Davis's claims require anything more than a tangential reference to the Constitution, and will not require substantial interpretation of its terms and provisions.

Addressing the first point, the defendants note that Davis alleges explicitly in his complaint that he was "properly elected" under the Union Constitution, and that the defendants "violated" the Constitution when they arranged for the position of Director of Region 2 to be eliminated. The defendants insist that proof of these allegations "indubitably will require interpretation of the Constitution's terms." Response at 9. The Court, however, disagrees that it will have to interpret the Constitution in order for Davis to prove his claims. As Davis points out, the defendants have never denied (and have no basis for denying) that Davis was elected pursuant to a regular and orderly process provided for under the Union Constitution. Admittedly, because the defendants have filed a motion to dismiss, the defendants have not *formally* answered Davis's allegation regarding his having been elected. But the Union does not seriously assert that Davis was not elected, and the Union never took any action challenging the validity of the election. Indeed, in the internal Union appeal brought by Davis to challenge the elimination of Region 2, the Union described the relevant

facts and noted that "Davis was elected by acclamation." Union Decision at 1 (Apr. 15, 2003).[3]

More important, the critical question in this case is not whether Davis was elected, nor is it whether the defendants eliminated Davis's position. Both of these questions are questions of fact, and are not under serious dispute. Indeed, the critical question is not even whether the defendants violated the Union Constitution by eliminating Region 2; while this question may have some evidentiary value, it is not a question that must be answered for Davis to prove all of the elements of his claims. In other words, Davis's claims for defamation, age discrimination, and retaliation *do not require proof* that the Union violated its own Constitution. Rather, the central question is whether the defendant's actions – regardless of whether they violated the Union Constitution – were motivated by discriminatory and/or maliciously defamatory intent. The question of whether the defendants eliminated Region 2 because: (1) it was no longer needed, (2) they felt Davis acted unethically during his political maneuvering, (3) they wanted to discriminate against Davis based on age, or (4) for some other reason, does not require a fact-finder or a Court to interpret the Union Constitution.

On this point, the Court finds instructive the case of *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir.1989), *cert. denied*, 493 U.S. 992 (1989). In *Smolarek,* one of the plaintiffs (Fleming) claimed that, after he suffered an injury at work, his employer (Chrysler)

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[3] Interestingly, the same decision notes that, although Davis also asserted that the elimination of Region 2 violated age discrimination laws, that was an issue for a court to decide. *Id.* at 4.

purposely gave him "job assignments inconsistent with his limitations," harassed him, and finally terminated him. *Id.* at 1328. Fleming filed a grievance, asserting that his termination was the product of illegal discrimination and in violation of the CBA. Fleming also filing a complaint in state court, asserting claims for : (1) violation of the Michigan statute that outlawed discrimination against the handicapped (known as "HCRA"); (2) retaliation for stating an intention to file a worker's compensation claim; (3) breach of the implied duty of good faith and fair dealing; and (4) intentional interference with employment relations. Although all of these claims were premised on state law, Chrysler removed the case to federal court, citing LMRA preemption. The Sixth Circuit Court of Appeals, however, held that the case had to be remanded to state court. The *Smolarek* court reasoned as follows:

> To defend against the HCRA charge, Chrysler must show that its actions were motivated by some factor other than Fleming's handicap. We recognize that Chrysler is likely to assert as its defense to Fleming's claim that it based its actions on the provisions of the labor agreement regarding reinstatement and accommodation. Even this defense, however, does not require a finding of preemption. In order to resolve the HCRA claim in light of this defense, a court need only decide whether Chrysler took actions adverse to Fleming because of his handicap or rather solely because Chrysler felt bound by the union agreement to take the actions or for some other legitimate reason. It is

> not necessary to decide at the outset whether or not Chrysler's interpretation of the agreement is correct as a matter of federal labor law. The question is a factual one: What was Chrysler's motivation? Under [*Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S. Ct.1877 (1988)], therefore, Fleming's HCRA claim is sufficiently "independent" of the collective bargaining agreement to escape § 301 preparation, for "resolution of the state-law claim does not require construing the collective-bargaining agreement." 108 S. Ct. at 1882 (emphasis added) (footnote omitted).

Smolarek, 879 F.2d at 1334.

Also, in *Smolarek,* the court examined a discrimination claim by a different plaintiff (Smolarek), who asserted that, after he suffered a seizure at work, his employer of 30 years terminated him illegally. *Id.* at 1328. Smolarek did not assert a claim that Chrysler violated the CBA. Rather, Smolarek filed a complaint in Michigan state court, alleging handicap discrimination under HCRA and workers' compensation retaliation. Defendant Chrysler removed the case, citing LMRA preemption; Chrysler argued that Smolarek's claim was "'substantially dependent' on interpretation of the collective bargaining agreement's provisions regarding an employee's right to reinstatement following disability leave." *Id.* at 1332. Chrysler even characterized Smolarek's discrimination claim as, in actuality, a *disguised* claim for breach of CBA.

Id. The Sixth Circuit Court of Appeals rejected Chrysler's arguments, and held remand was appropriate:

> The fact that the collective bargaining agreement contains a provision regarding reinstatement does not compel a finding of §301 preemption.*** Even if Smolarek may have been able to charge Chrysler under these circumstances with a violation of the collective bargaining agreement, he did not choose to do so and this does not mean that §301, even if applicable but not utilized by plaintiff, preempts the claim.***
>
> Chrysler may, in its own defense, assert that its treatment of Smolarek was allowed or required by the terms of the collective bargaining agreement and therefore was not based on Smolarek's handicap. The assertion of a defense requiring application of federal law, however, does not support removal to federal court:
>
> > It is true that when a defense to a state claim is based on the terms of a collective bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a §301 question, in a defensive argument does

> not overcome the paramount polices embodied in the well-pleaded complaint rule—that the plaintiff is the maser of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.

Id. at 1332-33 (quoting *Caterpillar, Inc. v. Williams,* 482 U.S. 386,398-99 (1997)). *See also Knafel v . Pepsi-Cola Bottlers of Akron, Inc.*, 899 F. 2d 1473, 1483 (6th Cir. 1990) ("Whether Pepsi harassed Knafel so outrageously as to cause her emotional distress and physical injury is a question that the district court can decide without interpreting the collective bargaining agreement. The LMRA does not deprive an employee of all common law rights of action"); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 381 (6th Cir. 1993) ("the ADEA action is not preempted by section 301 of the Labor Management Relations Act because 'employees have the right not to be discriminated against on the basis of age or handicap without regard to the collective bargaining agreement's language about an employee's rights'").

The holding of *Smolarek* applies directly to this case. It is true that the defendants will certainly point to (indeed, *have* pointed to) certain provisions in the Union Constitution and argue that those provisions, and not any

discriminatory motive, excuse or explain why they took the actions they did. But this defense does not require substantial interpretation of the Constitution itself. Even if there is some interpretation of the Constitution that is required, it will be minimal and tangential to the claims Davis asserts. Simply, Davis's stated causes of action are "state[-law] claim[s], sufficiently set out as separate and apart from a [claim of violation of the Union Constitution], and thus avoid[] preemption." *Id.* at 1331. As such, the defendants' removal of this case to federal court based on LMRA preemption, premised on the need to interpret the Union Constitution's provisions regarding Davis's election, was not properly grounded.

Essentially the same analysis applies to the defendants second point—that, because Davis has alleged he is not a bona fide executive or high policymaker, the Court will have to interpret the Union Constitution. As defendants note, the Ohio Age Discrimination statute states that it is *not* illegal "for any employer ... or labor organization to ... [r]etire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position...," if the employee is entitled to an annual pension of at least $44,000.00. Ohio Rev. Code §4112.02(O)(3). Davis affirmatively alleges he does not fall within this exception. Complaint at ¶10. The defendants assert that the Union Constitution contains a number of provisions defining the power of the International Executive Board, of which Davis was a member; accordingly, the defendants insist that "[e]ach of these Constitutional provisions must be interpreted against the statutory definitions of bona fida executive and high policymaker." Response at 11-12.

Once again, however, the defendants' reliance upon the Constitution *as an affirmative defense* does not turn Davis's independent claims into labor contract claims. Whether Davis meets the legal requirements for the "bona fide executive" exemption will require a simple factual analysis. The question of what powers the Union Constitution gave to Davis may well have important evidentiary value regarding the applicability of the exemption set out in §4112.02(O)(3). But the extent of the duties and responsibilities accorded to Davis under the Union Constitution is not a question that requires substantial interpretation of that document, nor is it a question that must be answered for Davis to prove all of the elements of his claims.

The defendants' third point is that the "Ethical Practices Code" ("EPC") contained in the Union Constitution arguably invested them with a legal privilege to issue their allegedly defamatory remarks, and the Court will have to interpret the EPC to determine the scope of this privilege. This argument is also unavailing. The provision to which the defendants point states:

> Each member have full freedom of speech.*** Each member shall have the right freely to criticize the policies and personalities of Union officials; however, this right does not include the right to undermine the Union as an institution; to vilify other members of the Union and its elected officials or to carry on activities with complete disregard of the rights of other members and the interests of the Union....."

Constitution at 140, EPC §1. As an initial matter, this provision explicitly *limits* the free speech "rights" of Union members, excluding the right to "vilify" other members—which obviously incorporates exclusion of the "right" to defame or slander. Thus, any arguable privilege of the defendants to criticize Davis is exactly contiguous with Davis's common-law right to be free from defamation. Further, an ethical code promulgated by a union cannot supercede state law. Unlike the situation in *DeCoe*, 32 F.3d at 216, the defendants' remarks in this case were not made during the course of grievance procedures *required* by a collective bargaining agreement. While the defendants' statements in *DeCoe* were arguably contractually mandated, and thus arguably privileged, the EPC in this case merely sets out aspirations. Interpretation of the CBA was required in *DeCoe* to determine the scope of the plaintiff's rights; interpretation of the EPC in this case is *not* required to determine whether the defendants defamed Davis. Again, the question of whether the defendants violated the EPC may have some evidentiary value, but it is not a question that must be answered for Davis to prove all of the elements of his defamation claims.

Finally, the defendants' fourth point is that Davis seeks, among other things, reinstatement, and the Court will have to interpret the Union Constitution "to determine whether the Constitution amendment that eliminated Davis'[s] former region was properly enacted in the manner required by the Constitution." Response at 13. The defendants add that the Court will also have " to determine whether Davis is eligible to hold office under the terms of the UAW Constitution, given his subsequent retirement from Ford Motor Company." *Id.* The relief Davis seeks, however, is not an essential element of any of

his claims. "If the plaintiff can prove all of the elements of his claim without the necessity of contract interpretation, then his claim is independent of the labor agreement." *DeCoe*, 32 F.3d at 216. The defendants' argument that Davis, if he prevails on his substantive claim, is not entitled to reinstatement, is more in the line of assertion of an affirmative defense. Whether Davis is entitled to reinstatement is a question that neither a Court nor a jury will address, if at all, until *after* Davis has proved "all of the elements of his claim[s]." *Id.* Thus, LMRA preemption is not premised properly on Davis's prayer for reinstatement.[4]

As the Sixth Circuit has explained, an age discrimination action normally "is not preempted by section 301 of the Labor Management Relations Act because 'employees have the right not to be discriminated against on the basis of age or handicap without regard to the collective bargaining agreement's language about an employee's rights.'" *LaPointe v. United Autoworkers Local 600,* 8 F.3d 376, 381 (6th Cir. 1993) (quoting *O'Shea v. Detroit News*, 887 F.2d 683, 687 (6th Cir.1989). "It is irrelevant to the preemption question whether or not the employer can defend by showing it had the right under the collective bargaining agreement to do what it did." *O'Shea*, 887 F.2d at 687. In this case, the defendants have not shown that any of Davis's state-law claims require interpretation of the Union Constitution, or invoke rights

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4 Moreover, Davis essentially moots the defendants' argument regarding LMRA preemption and reinstatement by conceding that the remedy of reinstatement is not available to him. As discussed below, Davis make this concession during the course of arguing the viability of LMRDA preemption jurisdiction

created by the Constitution, or are in some other way dependent on the Constitution. At best, the defendants show that their affirmative defenses will require reference to the Constitution. This is not enough to obtain federal jurisdiction under LMRA preemption.

B. LMRDA Preemption.

The defendants also argue that, in addition to being preempted by LMRA, Davis's claims are preempted by LMRDA. Congress passed LMRDA "in large part to address the growing problems of racketeering, crime, and corruption in the labor movement." *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local No. 54,* 468 U.S. 491, 505 (1984). Unlike the case with LMRA, LMRDA preemption is quite narrow. Defendants concede, as they must, that "Congress did not intend to occupy the entire field of regulation, as the text of LMRDA explicitly makes reference to continued viability of state laws." *O'Hara v. Teamsters Union Local No. 856,* 151 F.3d 1161 (9th Cir. 1998) (citing 29 U.S.C. §523). Indeed, "Congress expressly provided *two* broad anti-preemption provisions in the LMRDA in response to objections initially raised by then Sen. John F. Kennedy (D-Mass)." *Fulton Lodge No.2 of Int'l Assn. of Machinists and Aerospace Workers AFL-CIO v. Nix,* 415 F.2d 212, 215 *(*5th Cir. *1969)(citing 29 U.S.C.§§413* and 523) (footnotes omitted, emphasis added); *see Brown,* 468 U.S. at 505-06 (characterizing §523(a) of LMRDA as "an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such pre-emption is expressly provided").

Despite the narrowness of LMRDA preemption, it does exist to the extent "expressly provided" by Congress. In particular, 29 U.S.C. §§481-83 provides that the exclusive remedy for challenging the results of a Union election is by pursuing administrative procedures prescribed by the Secretary of Labor. The defendants seek to bring this case within the ambit of LMRDA preemption by focusing, again, primarily on one aspect of the relief sought by Davis: reinstatement. After Davis was elected as Director of Region 2, the delegates to the Union's Constitutional Convention voted to amend the Constitution and eliminate Region 2, and with it Davis's position. Defendants argue that Davis, by seeking reinstatement, is essentially challenging the results of the Union Constitutional Convention delegates' vote, which he may not do by any means other than those set out in 29 U.S.C. §§481-83. Defendants further note that, for Davis to obtain the Court-ordered reinstatement he seeks, a Court would have to choose between conflicting Union election results: "the results of the first election in which Davis was [elected as] Director of Region 2, and the results of [subsequent] elections, in which other persons were elected to serve redrawn jurisdictions which include among them portions of the UAW membership formerly in Region 2." Motion to dismiss at 12. Again, defendants note that "only the Secretary of Labor may bring an action seeking the installation in union office of a disappointed union member such as Davis, or related relief." *Id.* Indeed, defendants argue that even Davis's prayer for an award of back pay shows the propriety of their removal of this case under LMRDA preemption principles, because a back pay award would necessarily be attributable to Davis's valid election as Director of Region 2.

In response to the defendants' LMRDA argument, Davis concedes that the remedy of reinstatement is not available to him. Reply at 13. This goes a long way toward mooting the defendants' argument. The question remains, however, whether Davis's prayer for back pay, alone, gives rise to LMRDA preemption. The defendants do cite a single unreported case lending some support to this position. *See Bermingham v. Castro,* 1999 WL 644342 at *2 (9th Cir. *1999)* ("although Bunting is not seeking to set aside the December 1989 election, the damages that he seeks for lost income and benefits attributable to the business agent position effectively challenge the validity of the election already conducted, which is an area in which Title IV provides the exclusive remedy").

The Court concludes, however, that the nature of the relief requested by Davis, alone, does not create federal preemption jurisdiction. The LMRDA is careful to state that, "except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer...of a labor... organization...under the laws of any State ...." 29 U.S.C. §523(a). "Generally speaking, [Ohio] law imposes a responsibility on employers, *including unions*, to refrain from discharging an employee on the basis of ...age over 40." *Smith v. International Brotherhood of Electrical Workers*, 109 Cal.App.4th 1637, 1653, 1 Cal.Rptr.3d 374, 385 (Cal. Ct. App.2003) (emphasis added). As the *Smith* Court noted,

> [b]ecause the LMRDA does not "explicitly provide to the contrary," these responsibilities [not to discriminate or

> retaliate] are neither "reduced" nor "limited" by the provisions of the Act. As a logical corollary, neither are the state's means of enforcing these responsibilities reduced or limited by the Act. Therefore, the LMRDA does not preempt an action against union for unlawful discharge based on age....

Id. Moreover, there is no direct conflict between federal law and the state laws allegedly violated by the defendants in the present case. "Nothing in the LMRDA even remotely condones the practice of ... age discrimination on the part of elected union officials." *Id.* To adopt the defendants' argument, merely because Davis prayed for back pay as one measure of the damages he suffered due to the defendants' allegedly illegal actions, he may not pursue his state law claims against them. This argument reads too much into Davis's prayer for relief.

Ultimately, if Davis proves that the defendants subjected him to illegal discrimination, retaliation, and/or defamation, he is entitled to compensatory damages.[5] A state court can surely instruct a jury regarding the proper measure of those damages, according to State law. An award of damages that includes back pay would not necessarily imply, as defendants assert, that one or more of the Unions election results were invalid. An award of damages that includes back pay would not necessarily imply, as defendants assert, that one or more of the

---

[5]The Court expresses no opinion as to whether Davis might be entitled to punitive damages.

Union's election results were invalid. Such an award could also (and would probably more accurately) imply that, *regardless* of the validity of the election, the defendants worked to obtain those results by pursuing discriminatory, retaliatory, and/or defamatory actions. Davis's state-law claims do not attack the ultimate validity of any Union election results; rather, his claims challenge the *means* by which the defendants secured those results. The LMRDA simply does not preempt state-law claims accusing a Union defendant of illegal acts and seeking appropriate relief. *See Bloom v. General Truck Drivers, Office, Food & Warehouse Union, Local 952,* 783 F.2d 1356, 1361 (9th Cir. 1986) (examining LMRDA and holding that to protect a defendant from a claim of wrongful discharge "by preempting a state cause of action based on it does nothing to serve union democracy of the rights of union members; it serves only to encourage and conceal such [illegal] acts and coercion by union leaders").

II.

In sum, the Court concludes that neither LMRDA nor LMRA preempt Davis's state law claims. Accordingly, the defendants' removal of the case to this Court was not well-taken, and Davis's motion to remand must be granted. Finally, the Court concludes that, in the circumstances presented, an award to Davis of attorneys' fees and costs under 28 U.S.C. §1447 is not appropriate.

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

No. 04-3131
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WARREN DAVIS,
Plaintiff-Appellee
v.
CLERK

FILED
FEB. 28th, 2005
LEONARD GREEN,

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW), ET AL.

Defendants-Appellants.

BEFORE: KEITH, MOORE, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Leonard Green, Clerk

28 U.S.C. § 1367 provides as follows, in pertinent part:

Section 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

* * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1447 provides as follows, in pertinent part:

Section 1447. Procedure after removal generally

* * *

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not review able on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be review able by appeal or otherwise.

29 U.S.C. § 482 provides as follows, in pertinent part:

Section 482. Enforcement

(a) Filing of complaint; presumption of validity of challenged election

A member of a labor organization -

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three

calendar months after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) Investigation of complaint; commencement of civil action by Secretary; jurisdiction; preservation of assets

The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) Declaration of void election; order for new election; certification of election to court; decree; certification of result of vote for removal of officers

If, upon a preponderance of the evidence after a trial upon the merits, the court finds -

(1) that an election has not been held within the time prescribed by section 481 of this title, or

(2) that the violation of section 481 of this title may have affected the outcome of an election, the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization.

* * *

29 U.S.C. § 483 provides as follows:

Section 483. Application of other laws; existing rights and remedies; exclusiveness of remedy for challenging election

No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this subchapter. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter. The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

Section 4112.02 of the Ohio Revised Code provides, in pertinent part:

§ 4112.02. Unlawful discriminatory practices.

(O) With regard to age, it shall not be an unlawful discriminatory practice and it shall not constitute a violation of division (A) of section 4112.14 of the Revised Code for any employer, employment agency, joint labor-management committee controlling apprenticeship training programs, or labor organization to do any of the following:

(1) Establish bona fide employment qualifications reasonably related to the particular business or occupation that may include standards for skill, aptitude, physical capability, intelligence, education, maturation, and experience;

(2) Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, including, but not limited to, a retirement, pension, or insurance plan, that is not a subterfuge to evade the purposes of this section. However, no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual, because of the individual's age except as provided for in the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 623, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 623, as amended.

(3) Retire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, of the employer of the employee, which equals, in the aggregate, at least forty-four thousand dollars, in accordance with the conditions of the "Age Discrimination in Employment Act Amendment of 1978," 92 Stat. 189, 29 U.S.C.A. 631, as amended by the "Age Discrimination in Employment Act Amendments of 1986," 100 Stat. 3342, 29 U.S.C.A. 631, as amended;

(4) Observe the terms of any bona fide apprenticeship program if the program is registered with the Ohio apprenticeship council pursuant to sections 4139.01 to 4139.06 of the Revised Code and is approved by the federal committee on apprenticeship of the United States department of labor.

Section 4112.14 of the Ohio Revised Code provides as follows:

§ 4112.14. Age discrimination by employers.

(A) No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee.

(B) Any person aged forty or older who is discriminated against in any job opening or discharged without just cause by an employer in violation of division (A) of this section may institute a civil action against the employer in a court of competent jurisdiction. If the court finds that an employer has discriminated on the basis of age, the court shall order an appropriate remedy which shall include reimbursement to the applicant or employee for the costs, including reasonable attorney's fees, of the action, or to reinstate the employee in the employee's former position with compensation for lost wages and any lost fringe benefits from the date of the illegal discharge and to reimburse the employee for the costs, including reasonable attorney's fees, of the action. The remedies available under this section are coexistent with remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code; except that any person instituting a civil action under this section is, with respect to the practices complained of, thereby barred from instituting a civil action under division (N) of section 4112.02 of the Revised Code or from filing a charge with the Ohio civil rights commission under section 4112.05 of the Revised Code.

(C) The cause of action described in division (B) of this section and any remedies available pursuant to sections 4112.01 to 4112.11 of the Revised Code shall not be available in the case of discharges where the employee has available to the employee the opportunity to arbitrate the discharge or where a discharge has been arbitrated and has been found to be for just cause.

No. 05-107

IN THE

Supreme Court of the United States

WARREN DAVIS,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE

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No. 05-107

WARREN DAVIS,

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v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

The instant case is the third in a set of legal proceedings initiated by Warren Davis in an effort to overturn a decision by the delegates to the 2002 convention of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (UAW) that denied Davis a union office to which he claims to have been duly elected.

The relevant background facts are succinctly stated in the opinion of the court of appeals:

> "At the 2002 Constitutional Convention of the International Union of the United Automobile Workers of

America (UAW), convention delegates adopted an amendment to the UAW Constitution that dissolved one of the UAW's geographic regions and redistributed its members among three neighboring regions. The amendment also had the effect of setting aside Warren Davis's reelection as a regional director . . . .

* * *

"Davis served for 19 years as an elected member of the governing board of the UAW. After deciding to run for Congress in 2002, Davis announced his intention to vacate his office in the UAW and endorsed his assistant director for his soon-to-be-vacant position. The election for the office, for which Davis's assistant was the sole candidate, was held at the UAW's Constitutional Convention in June of 2002. Due to an apparent last-minute change of heart, however, Davis arranged for his assistant to nominate Davis and then withdraw from the race, resulting in Davis winning the election unopposed.

"During his many years of service with the UAW, Davis had been part of an unofficial caucus of politically powerful members who adhered to an informal agreement not to seek elective office after reaching 65 years of age. Angered by Davis's surprise tactics at the convention and his acceptance of an elected position at the age of 67, several members of the unofficial caucus issued a press release calling upon the UAW convention delegates to eliminate Davis's region, redistribute its members among three other regions, and hold new elections. This proposal was adopted by the UAW Constitutional Convention, which promptly dissolved Davis's region the day after his reelection." Pet. App. 2a-3a.

See also Davis v. International Union, U.A.W., 390 F.3d 908, 909 (6th Cir. 2004), *cert. denied*, 125 S.Ct. 1958 (2005) (description of same facts in an earlier case brought by Davis).

"Title IV of the [Labor Management Reporting and Disclosure Act] specifically regulates the conduct of elections for union officers." *Furniture Moving Drivers v. Crowley*, 467 U.S. 526, 539 (1984). This Court has described the Title IV regulatory scheme as follows:

> "Title IV of the statute establishes a set of substantive rules governing union elections, LMRDA § 401, 29 U.S.C. § 481, and it provides a comprehensive procedure for enforcing those rules, LMRDA § 402, 29 U.S.C. § 482. Any union member who alleges a violation may initiate the enforcement procedure. He must first exhaust any internal remedies available under the constitution and bylaws of his union. Then he may file a complaint with the Secretary of Labor, who 'shall investigate' the complaint. Finally, if the Secretary finds probable cause to believe a violation has occurred, he 'shall . . . bring a civil action against the labor organization' in federal district court, to set aside the election if it has already been held, and to direct and supervise a new election. . . . . [W]ith respect to an election already conducted, '[t]he remedy provided by [Title IV] . . . shall be exclusive.' LMRDA § 403, 29 U.S.C. § 483." *Trbovich v. Mine Workers*, 404 U.S. 528, 531 (1971).

On October 23, 2002, Davis brought suit under Title I of the LMRDA challenging the decision of the UAW convention to abolish his office. On August 1, 2003, the district court dismissed Davis's LMRDA Title I lawsuit on the following grounds:

> "In essence, the complaint challenges the propriety of a vote to amend the UAW constitution. The vote was taken as part of an election process and resulted in a rerun election. Despite plaintiff's characterization of the relief sought, reinstatement of Region 2 would essentially validate the results of an election already conducted in which Davis was elected director. At the same time, this court would have to invalidate the post-amendment elections of successful candidates in the

redrawn Regions 2B, 8 and 9. Such post-election relief must be sought exclusively with the Secretary of Labor in accordance with 29 U.S.C. § 483. The contemplated relief challenges an election already conducted, and thus, the court lacks subject matter jurisdiction pursuant to the limitations of Title IV of LMRDA." *Davis v. International Union, U.A.W.*, 274 F.Supp.2d 922, 925 (E.D. Mich. 2003), *aff'd* 390 F.3d 908 (6th Cir. 2004), *cert. denied*, 125 S.Ct. 1958 (2005).

On May 15, 2003, Davis filed a complaint with the Secretary of Labor requesting that the Secretary secure Davis's installation to union office. On November 5, 2003, the Secretary dismissed Davis's complaint on the following grounds:

> "With respect to whether the delegates violated your right to hold union office under section 401(e) of the LMRDA, 29 U.S.C. §481(e), the Department of Labor regulations at 29 C.F.R. §452.46 state in pertinent part that a union may not establish qualifications for office that are 'inconsistent with any other Federal law' and may not 'establish a retirement age or comparable age restriction on candidacy since this would be inconsistent with the Age Discrimination in Employment Act of 1967, as amended' (ADEA). Under the ADEA, it is unlawful for a labor organization to discriminate against any individual because of his age. 29 U.S.C §623(c). Within the ADEA, there is an exception for certain employees who hold 'high policymaking position[s].' See the ADEA regulations at 29 C.F.R. §1625(d)(2) (quoting the legislative history in H.R. No. 95-950, n. 9, which state that the exception was intended to apply to 'heads of major departments or divisions').
>
> "Although the Department's investigation disclosed the existence of an informal agreement among members of a caucus of members not to run for UAW International office after reaching 65 years of age, it further established that the UAW has no governing rule imposing an age limitation on candidates for office. Similarly,

> the vote of the delegates to reorganize the regions did not establish a 'qualification[ ]' on the right to be a candidate or to hold office and you [Davis] were provided with an opportunity to run for office in a reconstituted region. *See* 29 U.S.C. §401(e). The reorganization, which eliminated your Region, was the result of a vote of the delegates, not the application of a union rule. There was, thus, no violation of the LMRDA." Sixth Circuit Jt. App. 329-330.

Finally, on June 4, 2003, Davis filed the instant case in the Court of Common Pleas for Cuyahoga County, Ohio. Davis's state court complaint alleged, *inter alia*, that he "was successfully elected as Director of Region 2 on June 5, 2002" and that the UAW Convention delegates subsequently voted "to eliminate the position held by Mr. Davis because of his age and the plaintiff's refusal to comply with the age discriminatory UAW rule and custom prohibiting members over the age 65 from running for International Union office and holding staff employment in the union." Sixth Circuit Jt. App. 9.[1] To remedy the allegedly unlawful denial of office, the Complaint demanded "[a]n order directing defendant UAW to reinstate plaintiff to the position which he would have held had the discrimination complained of herein not occurred" and "[a]n order awarding plaintiff all back pay and/or bonuses to which he is entitled to as a result of defendants' unlawful actions and inactions." *Id.* at 16.

The defendants removed Davis's case to federal court, "assert[ing] that the adjudication of Davis's state-law claims would necessarily require a determination regarding the validity of the UAW election, an exclusively federal question under Title IV of the LMRDA." Pet. App. 4a.

---

[1] In addition to raising this claim for age discrimination in violation of Ohio Rev. Code § 4112.02, Davis's state court complaint raised a myriad of other state law claims that are not pertinent to the questions presented by the petition for certiorari.

In determining whether Davis's complaint raised a federal question, the district court began by observing that LMRDA Title IV provides "the exclusive remedy for challenging the results of a Union election." Pet. App. 29a. In this regard, the court noted, the "[d]efendants argue[d] that Davis, by seeking reinstatement, is essentially challenging the results of the Union Constitutional Convention delegates' vote, which he may not do by any means other than those set out in [LMRDA Title IV]." *Ibid.* The court concluded that this point had been "moot[ed]," because "[i]n response to the defendants' LMRDA argument, Davis concedes that the remedy of reinstatement is not available to him." *Id.* at 30a.[2] Turning to "whether Davis's prayer for back pay, alone, gives rise to LMRDA preemption," *ibid.*, the district court concluded that it did not, because "[a]n award of damages that includes back pay would not necessarily imply . . . that one or more of the Union's election results were invalid," *id.* at 31a-32a.

Having determined that "Davis's state-law claims do not attack the ultimate validity of any Union election results," the district court concluded that "the defendants' removal of the case to this court was not well-taken" and granted "Davis's motion to remand." Pet. App. 32a.

In reviewing the district court's order, the court of appeals first considered whether it was "barred by 28 U.S.C. § 1447(d) from hearing the UAW's appeal from the district court's remand order." Pet. App. 5a. In deciding this question, the court of appeals applied the well-settled rule that "[w]here a district court had proper jurisdiction at the time of removal, but events occurring after removal make remand to the state courts appropriate, § 1447(d) does not bar appellate review of the district court's remand order." *Id.* at 6a. Under that rule,

[2] Davis later denied that he had made this concession, but the district court did not take account of his denial.

and "[b]ecause the district court remanded this case only after finding that a post-removal event had deprived it of subject matter jurisdiction," the court of appeals concluded that it had "appellate jurisdiction over the district court's remand order." *Id.* at 7a-8a.

Turning to the merits, the court of appeals "disagree[d]" with "the district court['s] conclu[sion] that Davis's claims were not preempted by the LMRDA because the indisputably federal questions of 'whether Davis was elected' and 'whether the defendants eliminated Davis's position' need not be answered in order to adjudicate Davis's claims." Pet. App. 8a. Rather, the court of appeals determined that "Davis's state-law claims in question, including his requested remedy of back pay, logically hinge on his assertion that he was lawfully elected." *Id.* at 10a. For that reason, the court of appeals "reverse[d] the district court's remand of Davis's state-law claims and remand[ed] with instructions to dismiss the claims on the basis that they are precluded by the LMRDA." *Id.* at 11a.

ARGUMENT

Neither of the two Questions Presented—the first going to the jurisdiction of the court of appeals to review the remand order in this case, and the second going to the merits of the court of appeals' ruling that the remand here was improper—warrants this Court's review. The petition for certiorari should be denied.

1. The court of appeals' ruling that there is "appellate jurisdiction [in this case] over the district court's remand order," Pet. App. 7a-8a, is both legally sound and entirely consistent with the decisions of this Court and of the other circuit courts. Equally to the point, the Sixth Circuit's reading of the district court's remand order is entirely sound and consistent, in interpretative approach, with the decisions of the other courts of appeals. Contrary to the Petitioner, the

court of appeals did *not* "'second-guess' the opinion of [the] district judge" in an effort to go behind the "stated reason" for a remand order. Pet. 11. Thus, the decision below does not even raise the question tendered by the Petitioner with the claim that "the courts of appeals are deeply divided." *Ibid.*

(a) The court of appeals relied upon two settled legal propositions in concluding that it had jurisdiction to review the remand order in this case.

The first, and more general, of these propositions is that 28 U.S.C. § 1447(d), which limits appellate review of remand orders, must be read in conjunction with 28 U.S.C. § 1447(c), which states the grounds for remand. As the court of appeals put it:

> "Although . . . the plain language of 28 U.S.C. § 1447(d) suggests that remand orders concerning cases removed pursuant to 28 U.S.C. § 1441 are never reviewable, . . . the Supreme Court's ruling in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), dictate[s] that §§ 1447(c) and (d) must be read together. Section 1447(c) directs the district court to remand a removed case 'if at any time before final judgment it appears that the district court lacks subject matter jurisdiction.' [R]eading § 1447(d) in conjunction with (c), . . . § 1447(d) prohibits review only of remand orders issued pursuant to a finding, under § 1447(c), that the district court lacked jurisdiction." Pet. App. 5a-6a (quotation marks, ellipses and citations omitted).

The second legal proposition—which is a corollary of the first—is that an unreviewable remand pursuant to § 1447(c) is a remand based on *lack of subject matter jurisdiction at the time of removal* and *not* a remand based on some other ground:

> "For a case to be deemed remanded pursuant to § 1447(c), the district court must find that subject matter jurisdiction was lacking at the time of removal and

> then remand on that basis; otherwise, § 1447(d) will not prohibit appellate review of the district court's remand order. Where a district court had proper jurisdiction at the time of removal, but events occurring after removal make remand to the state courts appropriate, § 1447(d) does not bar appellate review of the district court's remand order." Pet. App. 6a (citations omitted).

The conclusion that follows from these propositions is that "a remand order is reviewable on appeal when the district court concludes that the action was properly removed but that the court lost subject matter jurisdiction at some point post-removal." Pet. App. 8a, quoting *First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456, 460 (6th Cir. 2002). Citing the instant case as an example, the Sixth Circuit recently explained that this "post-removal-event" doctrine justifies "reviewing the district court's remand order when a party had 'expressed his intent to abandon a claim,' thus converting a case over which the court had subject matter jurisdiction into a case that the district court could remand in its discretion under § 1367." *Dawalt v. Purdue Pharma, L.P.*, 397 F.3d 392, 401 (6th Cir. 2005).

As explained in *Dawalt* and as applied in the instant case, the "post-removal-event" doctrine has been universally accepted by the circuit courts. *See Adkins v. Illinois Central Railroad*, 326 F.3d 828, 832-833 (7th Cir. 2003) (reviewing circuit precedent); *Poore v. American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1291-92 (11th Cir. 2000) (same). Indeed, the Petitioner does not argue to the contrary but rather proceeds on the assumption that the "post-removal-event" doctrine is correct. *See* Pet. 11 ("there is appellate jurisdiction to review remand orders that are issued in cases in which there was unquestionably federal jurisdiction at the time of removal, but later events have eliminated the claims that afforded a basis for the removal").

(b) Given the dichotomy between appealable remand orders and unappealable remand orders, the courts of appeals must determine in each particular case whether the remand order was based on the § 1447(c) lack of subject matter jurisdiction ground or on some other ground. According to the Petitioner, in making that determination "the courts of appeals are deeply divided on the question of whether, and to what extent, the court should 'second-guess' the opinion of a district judge who has decided to remand a case for a stated reason that facially complies with section 1447(c), and determine whether the real reason for remand might have been one not within the statute, and hence subject to appellate review." Pet. 11.

The Petitioner overstates the conflict among the circuits with respect to this second level issue of the correct method for interpreting district court remand orders. It is true that "the Fifth Circuit has taken a strict approach" of interpreting remand orders according to their terms. 16 *Moore's Federal Practice* (3d ed.) § 107.44[2][c][i] pp. 107-255. However, most of the circuits that the Petitioner would array against the Fifth Circuit are similarly "strict" in their interpretative approach. *See, e.g., Rubel v. Pfizer, Inc.*, 361 F.3d 1016, 1020 (7th Cir. 2004) ("If the judgment is one remanding for lack of jurisdiction, the reasoning in the opinion is not independently reviewable."). And, as we show, the court of appeals followed the "strict" approach in interpreting the remand order in this case.

In distinguishing itself from "the Ninth Circuit[, which] will look beyond the language of the remand order to all the surrounding circumstances, in determining whether the [remand] order" was based on a non-§ 1447(c) ground, the Fifth Circuit has stated that it "will only review remand orders if the district court affirmatively states a non-1447(c) ground for remand." *Solely v. First Nat'l Bank of Commerce*, 923 F.2d 406, 408 (5th Cir. 1991) (quotation marks and cita-

tions omitted). But the court of appeals here did not enter this contested terrain by "look[ing] beyond the language of the remand order to all the surrounding circumstances." *Ibid.*

Far from "second-guessing" the district court's opinion, the court of appeals proceeded on the basis that "the real reason for remand" in this case was the "stated reason" appearing in the district court's opinion. Pet. 11. This is the approach advocated by the "strict" Fifth Circuit—and accepted as proper by every other circuit—which holds that whether a district court has "stated a § 1447(c) basis for remand" is to be determined on the basis of "[a] plain and common sense reading of the . . . remand order." *Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000).

"[T]he opinion of [t]he district judge" in this case does *not* provide a "a stated reason [for the remand] that facially complies with section 1447(c)." Pet. 11. The district court did *not* cite § 1447(c) as providing the basis for remand. Nor did the district court use § 1447(c)'s operative phrase—"lacks subject matter jurisdiction"—in explaining the remand.

Rather than invoke § 1447(c) or refer to a lack of subject matter jurisdiction at the time of removal, the district court squarely based the remand order on a non-§ 1447(c) ground, the occurrence of a post-removal-event:

> "The UAW removed this case to the district court, arguing that there was federal question jurisdiction over Davis's claim for reinstatement because the claim constituted a request for postelection relief under the exclusive jurisdiction of the LMRDA. Only after finding that Davis had 'conceded that the remedy of reinstatement was not available to him' did the district court conclude that the case must be remanded because subject matter jurisdiction had been lost. The district court found that Davis had expressed his intent to abandon this claim in his memorandum supporting his remand motion, which

was filed over a month after the case was removed from the state court.

> "On this point the district court may have been mistaken, however, because Davis did not amend his complaint to remove his claim for reinstatement and has made clear his intention to preserve the claim. Regardless, the district court plainly relied on Davis's alleged concession in remanding the case, finding that it 'goes a long way toward mooting the defendants' argument' of preemption by the LMRDA." Pet. App. 7a-8a.[3]

It was precisely because "the district court remanded this case only after finding that a post-removal event had deprived it of subject matter jurisdiction" that the court of appeals concluded it could "exercise appellate jurisdiction over the district court's remand order." Pet. App. 8a.

The most the Petitioner can say in response to the court of appeals' reading of the district court's opinion is that "[a]nother interpretation of the district court's opinion is that the district judge's mistake of fact about whether Davis had changed his prayer for relief did not affect its view of jurisdiction." Pet. 15. The proposition that there may be "another interpretation of the district court's opinion" falls far short of establishing that the court of appeals' interpretation is not the "plain and common sense reading of the . . . remand order," *Heaton*, 231 F.3d at 997, and hence the strict-interpretation reading of the district court's order. And, the truth is that the Petitioner's proffered interpretation of the district court's order cannot be squared with the district court's "stated reason" for remanding this case. *Id.* 11.

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[3] The district court explained why it had left two motions for the state court to decide by noting that it had "conclude[d] it does not have jurisdiction over the case." Pet. App. 13a-14a. In context, it is apparent that the district court reached this conclusion on the basis that the plaintiff had dropped his claim for reinstatement and did so after the plaintiff's post-removal expression of an intent to drop that claim.

The district court recognized that LMRDA Title IV provides "the exclusive remedy for challenging the results of a Union election," Pet. App. 29a, and that court decided that "removal of this case was not well-taken" only after determining that that "Davis's state-law claims do not attack the ultimate validity of any Union election results," *id.* at 32a. The district court determined that "Davis's prayer for back pay, alone, [did not] give[] rise to LMRDA preemption," *id.* at 30a, because "[a]n award of damages that includes back pay would not necessarily imply that one or more of the Union's election results were invalid," *id.* at 31a-32a. But the same cannot be said of an order reinstating Davis to elected office. That remedy would, as the district court acknowledged, validate the results of the election Davis won and invalidate the results of the subsequent elections held in the reconfigured regions. *Id.* at 29a. The sole reason given by the district court for disregarding this basis for LMRDA preemption was that "Davis concede[d] that the remedy of reinstatement is not available to him." *Id.* at 30a. And, this "concession"—to the extent it was made at all—was made *after* removal "[i]n response to the defendants' LMRDA argument" against remand. *Ibid.*

(c) Having failed to advance a plausible interpretation of the remand order as based on § 1447(c), the Petitioner changes tack and argues that review should be granted to determine whether the appellate courts "have jurisdiction to review remand decisions that are based on section 1367(c) once the admittedly federal claims on which removal was based have been removed from the case." Pet. 17. That is not a question warranting this Court's attention.

The Petitioner grudgingly admits that "the courts of appeals have generally concluded" that there is jurisdiction to review such remand decisions. Pet. 17 (citing decisions of the Third and Seventh Circuits). The truth of the matter is that no fewer than eight circuits have addressed

this question, and every one has held that "28 U.S.C. § 1447(d) is inapplicable to remand order[s] made pursuant to 28 U.S.C. § 1367(c)." 16 *Moore's Federal Practice* (3d ed.) § 107.44[2][d] pp. 107-262-263 n. 53.5 (citing precedent from the Third, Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits). Thus, as the Seventh Circuit has observed, "appellate jurisdiction to review [a § 1367(c) remand order] is firmly established." *Baker v. Kingsley*, 387 F.3d 649, 656 (7th Cir. 2004).

The Petitioner's sole ground for bringing this well-settled circuit court law to this Court is that two sets of "decisions [—one set involving § 1447(e) and the other set involving § 1445—] support the contention that section 1447(d) is not limited to protecting against review of remands under only one small subsection of the Congressional scheme governing removal and remand." Pet. 17-18. This is a complete *non sequitur*.

The first set of decisions stands for the unremarkable proposition that, in reading § 1447(d) *in para materia* with the other subsections of § 1447, "there is no 'reason to treat the grounds for remand authorized by § 1447(e) in a different way than the Supreme Court treated the grounds authorized in § 1447(c).'" *Stevens v. Brink's Home Security, Inc.*, 378 F.3d 944, 948 (9th Cir. 2004), quoting *Washington Suburban Sanitary Commission v. CRS/Sirrine, Inc.*, 917 F.2d 834, 836 n. 5 (4th Cir. 1990). And, the second set of decisions does no more than reveal some disagreement among the circuits over whether "a remand pursuant to § 1445(c) is based on a procedural defect rather than a lack of subject matter jurisdiction," *New v. Sports & Recreation, Inc.*; 114 F.3d 1092, 1097 n. 7 (11th Cir. 1997), a point which is significant in determining whether a motion for remand under § 1447(c) must be made within thirty days of removal, *id.* at 1096-97.

In short, neither set of decisions has anything to do with—much less provides a basis for calling into question—the

legally distinct set of decisions "firmly establish[ing]" that there is "appellate jurisdiction to review [a § 1367(c) remand order]." *Baker*, 387 F.3d at 656.

2. Having spent twenty pages arguing that the court of appeals lacked jurisdiction to review the remand order in this case, the petition ends with a five page coda arguing that this Court should review the appellate court's ruling that removal was proper on "complete preemption" grounds. Pet. 20-25. There is no basis for this Court to review the court of appeals' ruling.

Significantly, the Petitioner does not quarrel with the general proposition that "Title IV of the LMRDA mandates that challenges to a previously conducted union election may only be brought by the Secretary of Labor." Pet. App. 8a. Nor does the Petitioner deny that "the indisputably federal questions of 'whether Davis was elected' and 'whether the defendants eliminated Davis's position' [would] need [to] be answered in order to adjudicate Davis's claims." *Ibid.*

Rather, the Petitioner argues, at the most abstract level, that for "'a federal statute wholly [to] displace[] [a] state law cause of action through complete preemption,'" it is not sufficient that the federal statute both preempts state law and provides a substitute federal remedy, as LMRDA Title IV most assuredly does, but that it is necessary for "Congress [to] create a federal, private cause of action that it intended to substitute for [the] state cause of action." Pet. 21, quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003).

The Petitioner did not raise this "private cause of action" argument in the court of appeals below. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-213 (1998), quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970). And, the Petitioner has cited no extraordinary

circumstances that would justify making an exception in this case.

For the sake of completeness, we note that there is no case law that is contrary to the court of appeals' LMRDA Title IV complete preemption ruling or that endorses the Petitioner's gloss on the "complete preemption" doctrine. Indeed, the decisions the Petitioner cites read *Beneficial Nat'l Bank v. Anderson, supra*, "to extend the complete preemption doctrine to any federal statute that both preempts state law and substitutes a federal remedy for that law, thereby creating an exclusive federal cause of action." *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004), citing Richard H. Fallon, Jr., *et al.*, *The Federal Courts and the Federal System* 22 (5th ed. Supp. 2003) (*Anderson* "suggests that any federal statute that both preempts state law and provides a substitute federal remedy creates 'an exclusive cause of action' that falls within the complete preemption doctrine.").

As we have already suggested, there is no question that, with respect to union elections, LMRDA Title IV "both preempts state law and substitutes a federal remedy for that law." *Briarpatch Ltd.*, 373 F.3d at 305. LMRDA § 403 addresses both points in terms:

> "No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive." 29 U.S.C. § 483.

The "exclusive" method for "challenging an election already conducted" is "a civil action against the labor organiza-

tion as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election." 29 U.S.C. § 482(b). This civil action may be brought only by the Secretary of Labor acting on a complaint by a member of the labor organization and upon a finding by the Secretary that there is "probable cause to believe that a violation of [Title IV] has occurred and has not been remedied." 29 U.S.C. § 482(a) & (b).

"[T]he proper relationship between state and federal remedies" for "illegal election conduct" was a matter of "great concern" to Congress during the debates leading up to enactment of the LMRDA. *Trbovich*, 404 U.S. at 534 n. 6. And, in deciding to vest jurisdiction over suits "to set aside [an] invalid election" exclusively in "the district court of the United States," 29 U.S.C. § 482(b), the LMRDA Congress specifically rejected a proposal "provid[ing] that enforcement suits could be filed in either state or federal courts," *Trbovich*, 404 U.S. at 533 n. 6. It thus could not be more clear that "Congress intended the federal cause of action to be exclusive." *Anderson*, 539 U.S. at 9 n.5.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

WARREN DAVIS,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), UAW REGION 2B, RONALD GETTELFINGER, and LLOYD MAHAFFEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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The petition for a writ of certiorari seeks this Court's review of two main questions, the first of which has two subparts. The first question, about the appealability of remand orders, presents the Court with an opportunity to address a problem whose existence respondents do not dispute – that the "narrow exception" to the non-appealability command of 28 U.S.C. § 1447(d), first created by this Court in *Thermtron Prod. v. Hermansdorfer,* 423 U.S. 336 (1976), has been so expanded by the lower courts that it has swallowed the rule. This expansion of *Thermtron*'s narrow exception has manifested itself in several ways. First and most important, there is a particularly serious disagreement among the circuits about whether a court of appeals must accept a district judge's characterization of his remand as being based on lack of jurisdiction. Second, many remand decisions are now subject to review because several circuits have decided that remands under the authority of 28 U.S.C. § 1367(c) are subject to appellate review simply because they are not remands under 28 U.S.C. § 1447(c), even though some other non-1447(c) remand decisions are generally accepted as being non-reviewable.

In their opposition to the petition, respondents attempt to nibble away at some of the subparts of this question; this Reply responds to those discrete points. But respondents never address the larger problem of which the individual questions are a manifestation. The Court should grant review in this case, as the petition argues, to restore the vitality of section 1447(d)'s command, and to ensure that the *Thermtron* exception once again becomes an exception, and not the rule.

1. The petition showed that there is broad disagreement among the circuits about whether reviewability of a remand order may be based on an appellate court's second-guessing of the trial judge's characterization of his reasons for remanding as being based on "lack of jurisdiction." The Third and Fifth Circuits have held that use of the term "jurisdiction" is the end

of the matter, and must be taken at face value, while the Tenth Circuits accepts such a characterization so long as the district judge has acted in good faith. The Fourth, Sixth and Eighth Circuit have squarely held that the district judge's reasoning must support the characterization of the remand as jurisdictional, while the Seventh Circuit has accused the Second and Ninth Circuits of being improperly "mesmerized" by the word "jurisdiction." Pet. at 13. This issue is squarely presented in this case and the Court should grant certiorari to resolve the conflict about it.

Respondents claim that the petition "overstates the conflict," Opp. at 10, but their only evidence in support of that proposition is the following conclusory assertion, coupled with a single citation: "However, most of the opposing circuits [that disagree with the strict 'stated reason' approach] are similarly 'strict' in their interpretative approach. *See, e.g.*, *Rubel v. Pfizer, Inc.*, 361 F.3d 1016, 1020 (7th Cir. 2004) ('If the judgment is one remanding for lack of jurisdiction, the reasoning in the opinion is not independently reviewable.')." Opp. at 10. Respondents do not even attempt to show the absence of a circuit split involving the Fourth, Sixth and Eighth Circuits.

The *Rubel* citation does not even show that the Seventh Circuit stands apart from the division in the circuits. The quoted language is at best ambiguous about whether the Seventh Circuit will review to determine whether the reason given below is, in fact, jurisdictional. The next sentence in *Rubel* expresses uncertainty about whether that court would join the Tenth Circuit in reviewing the trial judge's adoption of jurisdictional reasoning for bad faith. Moreover, *Rubel* was decided more than three months **before** *Karcher v. Putnam Funds Trust*, 373 F.3d 847 (7th Cir. 2004), the Seventh Circuit

case cited in the petition.

Instead, respondents emphasize that the decision below is consistent with the "strict" stated reasons approach, but their argument is faulty. The district court repeatedly characterized its reason for remanding as being lack of jurisdiction through preemption. Pet. App. 13a-14a ("Given that the Court concludes that it **does not have jurisdiction** over the case"), 30a ("The Court concludes that the nature of the relief requested by Davis, alone, **does not create federal preemption jurisdiction**"); 32a ("neither the LMRDA nor LMRA preempt Davis's state law claims. Accordingly, the defendants' **removal** of this case to this Court **was not well-taken**") (emphasis added in all quotations). To be sure, **if** there had been a post-removal event that eliminated a claim which, at the time of removal, conferred subject matter jurisdiction on the trial court, then the trial judge's assertions that the court lacked jurisdiction due to complete preemption would be wrong. Similarly debatable is the trial judge's statement that Davis' relinquishment of the reinstatement claim avoided any need to decide whether the reinstatement claim was completely preempted, and thus whether that claim created a basis for removal in the first instance. After all, **if** the eliminated claim was completely preempted and hence removable, then the district court would have had pendent jurisdiction over the remaining claims under 28 U.S.C. § 1367, and the remand would not have been required but rather discretionary under section 1367(c). However, any error in the district court's reasoning would not be a reason to recognize **appellate** jurisdiction unless the view of the Fourth, Sixth and Eighth

Circuits on this question is correct.[1] Thus, the first issue, on which the circuits are sharply divided, is squarely presented in this case, and the Court should grant review to consider it.

2. The petition also urges the Court to grant review to decide whether discretionary remand decisions authorized by 28 U.S.C. § 1367(c) could be reviewed in the courts of appeals. The petition acknowledges that there is no division among the courts of appeals directly on this point, but notes first that the question remains open in this Court – indeed, Justices Kennedy and Ginsburg flagged the fact that it remains open, Pet. at 10 – and, second, that the circuits **are** divided in their analysis of closely related points – whether remand decisions authorized by 1445(a) and 1447(e) are subject to appellate review. Pet. 17-18. Respondents argue that reference to these other divisions among the circuits is a "non sequitur," Opp. 14, because the refusal to allow appellate review of these remand decisions may well be justified for reasons consistent with *Thermtron*. But the same reasons for barring appellate review of these other remand orders – that the remands were based on Congressionally authorized grounds – also apply to section

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[1] In any event, all parties agreed in their appellate briefs that the district court erred when it asserted that petitioner relinquished his claim for reinstatement. Indeed, respondents based their argument below for complete preemption on the contention that the claim had never been eliminated. Brief of Defendants-Appellants, at 38. The court of appeals, for its part, noted that the district court "may have been mistaken" in this respect. Pet. App. 7a. In this Court, respondents bury their acknowledgment of this point in a footnote, Opp. at 6 n.2, without acknowledging that the fact that no claim was ever relinquished bars their contention that there was a post-removal event that could have afforded a basis for pendent jurisdiction.

1367(c) remands if what *Thermtron* is about is reining in judges who remand to state courts for reasons that they invent unrelated to standards established by Congress. If that is the purpose of the *Thermtron* exception, then a judge who invokes the remand authority afforded by section 1367(c) should also be immune from appellate scrutiny even if his reasoning is wrong. On the other hand, if the gist of *Thermtron* is to limit section 1447(d) to remands enumerated by section 1447(c), then remands authorized by any other statute should be subject to appellate review, and the circuits barring review of section 1445 and section 1447(c) remands are reading section 1447(d) too broadly. Thus, the fact that lower courts have generally agreed regarding appellate review of section 1367(c) remands should not bar review because their reasoning in this regard conflicts with some circuits' reasoning about review of other remands under section 1447(d) and *Thermtron*.

3. Finally, the petition seeks review of the ruling below on the issue of removal based on complete preemption, contending that complete preemption can be provided only by a federal statute that creates a private right of action that the plaintiff could have filed in federal court, and thus could displace the state cause of action with a federal one. There is growing disagreement among the courts of appeals about whether, as respondent argues, the mere existence of a "federal remedy," Opp. 16, including the right to file an administrative complaint, is a sufficient basis for complete preemption.

Respondents do not deny that there is a broad split in the circuits on that question, but contend only that petitioner failed to preserve the issue below and that the Sixth Circuit was correct. However, petitioner has consistently argued from the outset of this case that the LMRDA does not completely preempt his state law claims. At most, then, petitioner is

simply making a new argument in support of his properly preserved claim in the lower courts. *See Harris Trust v. Salomon Smith Barney*, 530 U.S. 238, 245 n.2 (2000) (petitioners may advance new argument in support of claims preserved below); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (same); *Yee v City of Escondido*, 503 U.S. 519, 535 (1992) (same). Moreover, the issue of preemption removal is to some extent antecedent to the issue of appellate jurisdiction, because the court of appeals' appealability determination was based on its assumption that a claim for reinstatement to petitioner's original position within the union was itself sufficient to render the complaint removable, so that its elimination from the case was a relevant "post-removal event" supplying pendent jurisdiction over the remaining claims. See *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (addressing statutory question that was "'predicate to an intelligent resolution' of the question presented," even though it was not raised below).

After this Court expanded the narrow "complete preemption" exception to the general rule that the presence of a federal law defense to a state law claim does not transform the state claim into a removable federal claim, by applying it to ERISA in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987), lower courts misconstrued the decision as authorizing removal jurisdiction based on preemption by many additional federal statutes, and the Court had to decide several additional cases to ensure that the complete preemption exception did not swallow the general rule. *E.g.*, *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989); *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998). As the petition demonstrates, the phenomenon of over-reaction is manifesting itself once more, and the sooner the Court reaffirms the vitality of the general rule, the less damage will be done to the sovereignty of

the states whose courts are deprived of the right to decide cases properly brought there, including the resolution of federal preemption defenses that may be interposed in such cases.

Many federal statutes create administrative remedies of one kind or another, and then enable federal agencies to go to court to enforce their decisions. If respondent is correct that the mere existence of a "federal remedy" is a sufficient basis for complete preemption, then the complete preemption exception will swallow the general rule that, absent diversity, preemption defenses must be litigated in state court and do not afford a basis for removal. For example, a case like *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986), would be removable if the defendant asserted that the Food Drug and Cosmetic Act preempted the plaintiff's tort claims. *But see id.* at 816 (preemption argument based on conflict between FDCA regime and state-court jurisdiction over claims that FDA standards were violated is not ground for removal where Congress did not provide private right of action to enforce FDCA).

As the petition shows, numerous decisions have begun to appear that threaten to obliterate the distinction between non-removable preemption defenses and completely preempted state claims. Review on this question presented is needed to push the genie of complete preemption removal back into the bottle.[2]

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[2]Respondent asserts that petitioner "does not deny that the indisputably federal questions of whether Davis was elected and whether the defendants eliminated Davis' position" have to be resolved to decide Davis' state law claims. Opp. 15. Petitioner does deny both that these are legal questions that turn on federal law, and that they need to be decided in order to address each of the state law claims. Petitioner also denies, of course, that these arguments are a

CONCLUSION

The petition for a writ of certiorari should be granted.

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proper predicate for removal on the basis of complete preemption.

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No. 05-107

In the Supreme Court of the United States

WARREN DAVIS, PETITIONER

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction over the district court's order remanding petitioner's claims to state court.

2. Whether petitioner's state-law claims are completely preempted by Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481-483.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 481-483, establishes substantive rules governing union elections and provides comprehensive procedures for enforcing those rules. *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 531 (1972). A union member alleging violations of Title IV may file a complaint with the Secretary of Labor. 29 U.S.C. 482(a). The Secretary must investigate the complaint, determine if there is probable cause to believe that a violation of Title IV has occurred and not been remedied, and, if so, file suit to obtain relief in United States district court. 29 U.S.C. 482(b) and (c).

Title IV is explicit that "[t]he remedy provided by this [title] for challenging an election already conducted shall be exclusive." 29 U.S.C. 483. Accordingly, there is no private right of action to challenge the validity of a union election. *Local No. 82, Furniture & Piano Moving* v. *Crowley*, 467 U.S. 526, 544 (1984). However, a union member may challenge the Secretary's decision not to bring suit, *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), and may intervene in a suit brought by the Secretary, *Trbovich*, 404 U.S. at 536.

2. Petitioner held an elected position—Director of Region 2—within respondent International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW). Pet. App. 2a, 14a. After announcing his intention not to run for reelection and endorsing his assistant director, petitioner arranged at the UAW's Constitutional Convention

for his assistant to withdraw from the election and to nominate him instead. *Id.* at 2a-3a. Petitioner won the election unopposed. *Id.* at 3a.

Petitioner was a member of an unofficial caucus of UAW officers who had informally agreed not to seek office after age 65. Pet. App. 3a. Several members of the caucus were angered by petitioner's surprise decision to run again for office at age 67. *Ibid.* Those members issued a press release stating that petitioner had lied about his plans for retirement and schemed "to deny an honest election to the membership." *Id.* at 10a. The press release called upon UAW convention delegates to eliminate Region 2, redistribute its members among three other regions, and hold new elections in the reconstituted regions. *Id.* at 3a. The delegates voted to eliminate Region 2 and divide it among the other regions. *Ibid.* Elections were held for directors of the new regions, but petitioner did not run in those elections. C.A. App. 328.

3. a. Petitioner sued the UAW in federal district court alleging a violation of Title I of the LMRDA, 29 U.S.C. 411(a)(1) and (2). Pet. App. 3a. The district court dismissed the suit on the ground that it challenged the validity of the UAW's elections and thus was within the exclusive jurisdiction of the Secretary under Title IV. *Davis* v. *UAW*, 274 F. Supp. 2d 922 (E.D. Mich. 2003). The court of appeals affirmed the dismissal. *Davis* v. *UAW*, 390 F.3d 908 (6th Cir. 2004), cert. denied, 125 S. Ct. 1984 (2005).

b. Petitioner also filed a Title IV complaint with the Secretary in which he contended that the elimination of Region 2 was invalid and that he should be installed as Region 2 Director. The Department of Labor conducted an investigation and determined that there had been no violation of Title IV. C.A. App. 328-330. The Department reasoned that the UAW's governing rules did not impose an age limitation on candidacy for union office and that the convention delegates followed the

procedures mandated by the UAW's constitution when they voted to eliminate Region 2. *Id.* at 329-330. Petitioner did not seek judicial review of the Department's determination.

4. In June 2003, petitioner filed this suit in Ohio state court against respondents. Petitioner alleged age discrimination, conspiracy to discriminate on the basis of age, wrongful discharge, retaliation, libel, and defamation, all in violation of Ohio law. Pet. App. 4a. He sought declaratory and injunctive relief, including an order directing respondents to reinstate him as Region 2 Director, as well as back pay, damages, and attorney's fees. C.A. App. 16. Respondents removed the case to federal district court. Pet. App. 4a. As relevant here, they contended that petitioner's claims were completely preempted by Title IV of the LMRDA because the claims would require a determination of the validity of the UAW's elections. *Ibid.* Petitioner filed a motion to remand the case, and the district court granted the motion. *Id.* at 12a-32a.

The district court first observed that "the exclusive remedy for challenging the results of a [u]nion election is by pursuing administrative procedures prescribed by the Secretary of Labor." Pet. App. 29a. The court noted that respondents argued that, in order to decide "one aspect of the relief sought by [petitioner]: reinstatement," the court would be forced "to choose between conflicting Union election results." *Ibid.* The court suggested that the reinstatement claim may therefore have provided the court with "federal preemption jurisdiction." *Id.* at 30a. The court believed, however, that petitioner had abandoned his request for reinstatement in his briefing on the remand motion, thus "mooting" that potentially adequate ground for "LMRDA preemption." *Ibid.*[1] The court concluded that none of petitioner's remaining grounds for

[1] The court was apparently mistaken. See Pet. App. 7a. Both parties agree that petitioner has not abandoned his claim for reinstatement. Pet. 6; Pet. C.A. Br. 11; Resp. C.A. Br. 38.

relief implicated "federal preemption jurisdiction," "necessarily impl[ied] * * * that one or more of the Union's election results were invalid," or was inconsistent with the LMRDA. *Id.* at 30a-31a. The court therefore determined that removal of the case was "not well-taken," and it remanded the case to state court. *Id.* at 32a.[2]

5. The court of appeals reversed and remanded the case to the district court with instructions to dismiss petitioner's claims as precluded by the LMRDA. Pet. App. 1a-11a.

The court first addressed its jurisdiction over the appeal in light of 28 U.S.C. 1447(d), which precludes appellate review of remands authorized by 28 U.S.C. 1447(c), such as remands for lack of subject matter jurisdiction at the time of removal. Pet. App. 6a; see *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976). The court determined that, "[w]here a district court had proper jurisdiction at the time of removal, but events occurring after removal make remand to the state courts appropriate, § 1447(d) does not bar appellate review of the district court's remand order." Pet. App. 6a (citing *First Nat'l Bank of Pulaski* v. *Curry*, 301 F.3d 456, 459 (6th Cir. 2002) (reviewing district court order that remanded supplemental state claims after having resolved federal claims)).

Here, the court of appeals concluded, the district court believed it possessed subject matter jurisdiction at the time of the removal. Pet. App. 7a. The court of appeals reasoned that, in deciding to remand the case, the district court "plainly relied" on its belief that petitioner had, subsequent to removal, "expressed his intent to abandon [his] claim" for reinstatement. *Ibid.* Because the district court remanded the case only after finding that this post-removal event had deprived it of jurisdiction (*i.e.*, eliminated the only federal issue

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[2] Because the district court "conclude[d] it does not have jurisdiction over the case," the court declined to rule on respondents' motions to dismiss the case and to transfer venue. Pet. App. 13a-14a.

from the case), the court of appeals concluded that it had appellate jurisdiction over the remand order. *Id.* at 7a-8a (citing *First Nat'l Bank of Pulaski*, 301 F.3d at 460).

As to the merits of the remand order, the court of appeals concluded that petitioner's state-law claims were properly removed to federal court and were preempted by the LMRDA. Pet. App. 8a-11a. The court reasoned that the claims of age discrimination, wrongful discharge, and retaliation "logically hinge on [petitioner's] assertion that he was lawfully elected," and claims for "post-election relief are relegated to the exclusive jurisdiction of the Secretary of Labor." *Id.* at 10a. The court determined that the remaining claims for libel and slander would likewise "necessarily require a court to revisit" the Secretary's determination that the UAW elections were valid. *Id.* at 11a. The court therefore held that those "claims are also preempted by Title IV of the LMRDA." *Ibid.*

DISCUSSION

The court of appeals concluded that it had appellate jurisdiction based on the well-settled rule that remand orders declining to exercise supplemental jurisdiction are subject to appellate review. That conclusion was based on the unique circumstances of this case and does not implicate any conflict among the courts of appeals that warrants this Court's plenary review. The court of appeals' determination that this case was properly removed to federal court also does not warrant review. There is no conflict among the courts of appeals on whether the LMRDA completely preempts state-law claims challenging the validity of union elections. The question whether there can be complete preemption when the plaintiff cannot invoke an alternative federal cause of action is not properly before the Court. In any event, this case is not an appropriate vehicle through which to resolve that abstract question. The petition for a writ of certiorari should therefore

be denied. Alternatively, the Court may wish to hold the petition pending the Court's decisions in *Kircher* v. *Putnam Funds Trust*, No. 05-409 (argued Apr. 24, 2006), and *Osborn* v. *Haley*, cert. granted, No. 05-593 (May 13, 2006), which involve the application, in different contexts, of 28 U.S.C. 1447(d).

I. THE APPELLATE JURISDICTION QUESTION DOES NOT WARRANT PLENARY REVIEW

A. The Court Of Appeals Based Its Jurisdiction On The Established Rule That Remand Orders Declining Supplemental Jurisdiction Are Subject To Appellate Review

Section 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. 1447(d).[3] This Court has stated, however, that Section 1447(d) must be read *in pari materia* with 28 U.S.C. 1447(c) and therefore bars appellate review only of remands based on the grounds covered by Section 1447(c). *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345-346 (1976); *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127-128 (1995). If a remand is based on a ground not covered by Section 1447(c), Section 1447(d) does not necessarily foreclose appellate review. *Thermtron*, 423 U.S. at 345; *Things Remembered*, 516 U.S. at 127.

One ground for remand not covered by Section 1447(c) is a remand of supplemental state-law claims for one of the reasons set forth in 28 U.S.C. 1367(c). For example, when the federal claim in a case is dismissed or abandoned, the district court may remand the case if the court concludes that it is inappropriate to retain jurisdiction over the state-law claims. *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 357 (1988).

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[3] Section 1447(d) excepts from its scope remands in civil rights cases removed under 28 U.S.C. 1443. That exception is not implicated here.

Although this Court has not addressed the question, see *Things Remembered*, 516 U.S. at 129-130 (Kennedy, J., concurring), the courts of appeals have uniformly concluded that remands declining supplemental jurisdiction are subject to appellate review. See 16 James W. Moore et al., *Moore's Federal Practice* § 107.44[2][d], at 107-262 n.53.5 (3d ed. 2006) (citing cases).

The court of appeals relied on that rule in concluding that it had appellate jurisdiction here. The court observed that the district court "plainly relied" on petitioner's purported abandonment of his reinstatement claim "in remanding the case." Pet. App. 7a. "Because the district court remanded [the] case only after finding that [this] post-removal event had deprived it of subject matter jurisdiction," the court of appeals concluded that appellate jurisdiction was proper. *Ibid.* The court explained that, "[w]here a district court had proper jurisdiction at the time of removal, but events occurring after removal make remand to the state courts appropriate, § 1447(d) does not bar appellate review." *Id.* at 6a. The court supported that proposition with a citation to *First National Bank of Pulaski* v. *Curry*, 301 F.3d 456, 459 (6th Cir. 2002), a case in which it had reviewed a district court order remanding supplemental state claims after the court had resolved the federal claims in the case.

Some language in the opinion below could be read to suggest that the decision rested on different reasoning. See, *e.g.*, Pet. App. 7a (referring to a conclusion by the district court that "subject matter jurisdiction had been lost" rather than a discretionary decision by that court not to exercise supplemental jurisdiction). But the court of appeals has clarified its rationale in a subsequent decision. In *DaWalt* v. *Purdue Pharma, L.P.*, 397 F.3d 392 (2005), the Sixth Circuit stated that the post-removal event "doctrine is implicated only when a district court makes a discretionary remand of pendent

state-law claims following the dismissal of a claim or a party." *Id.* at 401. The court cited this case as an example, describing it as a case "reviewing the district court's remand order when a party had 'expressed his intent to abandon [a] claim,' thus converting a case over which the court had subject matter jurisdiction into a case that the district court could remand in its discretion under § 1367." *Ibid.* (quoting Pet. App. 7a). *DaWalt* therefore makes clear that this case does not stand for any broader proposition in the Sixth Circuit.

B. Review Is Not Warranted To Address The Reviewability Of Remand Orders Declining Supplemental Jurisdiction

Petitioner contends (Pet. 16-20) that this Court should grant certiorari to decide whether the court of appeals was correct in concluding that remand orders declining supplemental jurisdiction are subject to appellate review. But there is no reason for this Court to address that question. Petitioner himself acknowledges that all of the courts of appeals that have addressed the issue agree that remand orders declining supplemental jurisdiction are reviewable. Pet. 10; Pet. Reply 4. Moreover, the uniform view of the courts of appeals appears to be consistent with this Court's decisions, which suggest that appellate review is barred only for the categories of remand orders described in Section 1447(c)—*i.e.*, those based on lack of subject matter jurisdiction and those based on other defects in removal. See *Thermtron*, 423 U.S. at 346; *Things Remembered*, 516 U.S. at 127; 28 U.S.C. 1447(c).

Even if this Court's guidance were needed on the question whether remand orders declining supplemental jurisdiction are subject to appellate review, this case would not be an appropriate vehicle through which to provide that guidance. Although the court of appeals treated the case as one in which the district court had declined jurisdiction under 28 U.S.C. 1367(c), it acknowledged that the district court had operated

on the erroneous belief that petitioner had abandoned his reinstatement claim. See note 1, *supra*. Moreover, rather than simply correct that error and remand to the district court, the court of appeals went on to rule that petitioner's claims were properly removed, an issue that would not otherwise have been appealable. If the district court had realized that the reinstatement claim had not been abandoned or the court of appeals had done no more than correct that error and remand, then the district court would have had only two options: (1) retain jurisdiction over the entire case on the theory that the LMRDA completely preempts the reinstatement claim or (2) remand the case on the theory that there is no complete preemption and therefore the court lacked jurisdiction at the time of removal. Neither option would have involved a remand under Section 1367(c), and neither option would have produced an immediately appealable order.

This Court should not address the propriety of appellate review of remand orders under Section 1367(c) in a case that, but for the district court's acknowledged factual error, could not possibly involve a valid remand under that Section. The peculiarity created by the district court's mistaken belief that petitioner had abandoned the reinstatement claim makes this a poor vehicle through which to address that issue.

C. Any Tension Among The Courts Of Appeals On How To Ascertain The Basis For A Remand Order Does Not Warrant Review In This Case

Petitioner contends (Pet. 11-15) that the Court should grant review because the courts of appeals disagree on whether they may look beyond the face of a remand order to determine the actual basis for the remand. Although there may be some tension among the courts of appeals on how to ascertain the basis for a remand order, this Court's review of that question in this case would be premature.

Contrary to petitioner's portrayal of a deep split among the courts of appeals, those courts generally agree that they may analyze a remand order to determine if there is a non-Section 1447(c) basis for the remand, even if the district court has stated that it lacks jurisdiction or has cited 28 U.S.C. 1447(c) or (d). See *Cogdell* v. *Wyeth*, 366 F.3d 1245, 1247-1249 (11th Cir. 2004); *Lindsey* v. *Dillard's, Inc.*, 306 F.3d 596, 599 (8th Cir. 2002); *Archuleta* v. *Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997); *Mangold* v. *Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996); *Baldridge* v. *Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1349 (6th Cir. 1993). Cf. *Spielman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 128 (2d Cir. 2003) (analyzing ambiguous order to determine basis for remand); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) (same).[4]

Statements in some cases suggest that the Fifth Circuit takes a more restrictive approach and views the district court's characterization of its remand order as controlling. The Fifth Circuit has said that "[r]eviewability of a remand order depends entirely upon the trial court's stated grounds

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[4] Petitioner contends (Pet. 12, 15) that the Tenth Circuit treats a district court's good-faith statement that it lacked jurisdiction as conclusively establishing that the remand order was based on Section 1447(c). That is incorrect. In *Archuleta*, the Tenth Circuit held that, notwithstanding "[a] district court's assertion that it lacks subject matter jurisdiction, and even explicit references to § 1447(c)," the court of appeals "will determine by independent review the actual grounds upon which the district court believed it was empowered to remand." 131 F.3d at 1362. Petitioner also misreads the Third Circuit's statement in *Balazik* v. *County of Dauphin*, 44 F.3d 209, 213 (1995), that appellate "review is forestalled only when the *stated reasons* for the remand include procedural or jurisdictional defects." In making that statement, the court meant only that "review is not proscribed even if a remand could have been ordered based on a § 1447(c) ground, but was not." *Ibid.* The court nowhere suggested that it could not analyze a remand order to determine the basis on which the district court actually remanded the case.

for its decision to remand." *Tillman* v. *CSX Transp., Inc.*, 929 F.2d 1023, 1026 (5th Cir.), cert. denied, 502 U.S. 859 (1991). That court of appeals has also said that it will deny appellate review pursuant to Section 1447(d) where the district court has stated that it is remanding for lack of jurisdiction, unless "the district court [has] 'clearly and affirmatively' relie[d] on a non-§1447(c) basis" for the remand. *Heaton* v. *Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000) (quoting *Copling* v. *Container Store, Inc.*, 174 F.3d 590, 596 (5th Cir. 1999)), cert. denied, 533 U.S. 915 (2001).

The apparent tension in methodology between the Fifth Circuit and the other courts of appeals does not warrant this Court's review at this time. First of all, it is not clear that this kind of disparate methodology gives rise to the type of circuit split that merits this Court's review. Unlike disagreements on broader issues of law, this kind of methodological dispute may have more impact on how district court judges draft remand orders than on the rights of the parties.

Second, it is also unclear how much practical difference there is between the two approaches. Like the other courts of appeals, the Fifth Circuit recognizes that it must examine the remand order to determine whether the district court intended to state a Section 1447(c) ground for remand and that there may be ambiguities in the order that require resolution. For example, in *Heaton*, the court of appeals undertook "a plain and common sense reading" of the remand order before concluding that the "order reveals that [the district court] stated a § 1447(c) basis for remand," and the court of appeals analyzed the order to determine that there was no "'mislabeling' of the basis for remand." 231 F.3d at 997-998. Moreover, in describing a prior decision, the court explained that "elucidation of the grounds for remand was required in order to determine the district court's reasons for remanding"

because "the remand order * * * was at first glance somewhat ambiguous." *Id.* at 998.

Third, even if the Fifth Circuit's different approach may have a practical impact, that court might still align itself with the other courts of appeals without this Court's intervention. The Fifth Circuit has not addressed the issue in an *en banc* opinion. And there is some tension between the Fifth Circuit's approach and this Court's cases on appellate jurisdiction. This Court's cases indicate that "[t]he label attached by the District Court to its own opinion does not, of course, decide * * * the jurisdictional issue," and that the appellate court must "determin[e] * * * the appealability of the trial court's action not by the name the court gave [its decision] but by what in legal effect it actually was." *United States* v. *Sisson*, 399 U.S. 267, 279 n.7 (1970) (citations omitted); see *Sullivan* v. *Finkelstein*, 496 U.S. 617, 628 n.7 (1990) (stating that "[t]he label used by the District Court * * * cannot control the order's appealability in this case").

If the Fifth Circuit's approach proves both significant and persistent, this Court could grant review in an appropriate case from the Fifth Circuit to correct the problem. This case, however, is not a good one in which to resolve any tension between the Fifth Circuit and the other courts of appeals. The Sixth Circuit may well have decided this case the same way even if it followed the Fifth Circuit's approach. Although the court of appeals here clearly engaged in some exegesis, it looked to the text of the district court's order in ascertaining the basis for the remand. The remand order did not invoke Section 1447(c) and did not state that the district court lacked jurisdiction *at the time of removal*.[5] On the con-

[5] The district court stated that it was not ruling on certain motions "[g]iven that [it] concludes it does not have jurisdiction over the case." Pet. App. 13a-14a. But courts sometimes use the term jurisdiction imprecisely. See *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004). And it is far from clear

trary, as the court of appeals noted, the remand order "plainly relied" on petitioner's purported abandonment of his claim for reinstatement. Pet. App. 7a. The court of appeals therefore concluded that the order indicated that the district court believed it had jurisdiction at the time of removal and thus was not relying on Section 1447(c). See *ibid.* Instead, the court of appeals determined, the remand was clearly based on a non-Section 1447(c) ground—the district court's conclusion that a post-removal event had eliminated any federal claims from the case and "[made] remand to the state courts appropriate." *Id.* at 6a; see *id.* at 7a-8a.

D. The Court May Wish To Hold This Case Pending Its Decisions in *Kircher* and *Osborn*

As petitioner observes (Pet. 13-14), there is a conflict among the courts of appeals regarding appellate jurisdiction over remand orders issued under the Securities Litigation Uniform Standards Act of 1998 (SLUSA). That conflict is not presented here but is at issue in *Kircher*, No. 05-409. Specifically, *Kircher* presents the question whether 28 U.S.C. 1447(d) precludes appellate jurisdiction over remand orders issued after the district court has determined that claims, which were originally removed under SLUSA's removal provision, do not fall within the scope of SLUSA's preemption provision. See 15 U.S.C. 77p(c) and (d)(4), 78bb(f)(3)(D). The Court's resolution of that question is likely to turn primarily on factors unique to the SLUSA statutory scheme. Nonetheless, to the extent the Court's decision in *Kircher* sheds light on the proper interpretation of Section 1447(d), the Court

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that the district court here meant that it did not have jurisdiction *at the time of removal*, which is the critical inquiry under Section 1447(c), *Pullman Co.* v. *Jenkins*, 305 U.S. 534, 537 (1939), as opposed to meaning that it no longer had jurisdiction because it had decided to remand the state-law claims.

may wish to hold the petition in this case pending that decision.

The Court may also wish to hold the petition in this case pending the Court's decision in *Osborn*, No. 05-593. In that case, this Court has asked the parties to brief the question whether Section 1447(d) bars appellate review of an order that overturns the substitution of the United States for a federal employee defendant under the Westfall Act, 28 U.S.C. 2679(d), and also remands the case to state court. Like *Kircher*, *Osborn* may provide guidance on how to interpret Section 1447(d). The Court may therefore wish to defer action on this case until the Court has resolved *Osborn* as well. However, because of the different contexts in which Section 1447(d) arises in this case and in *Osborn* and *Kircher*, and because this case does not independently warrant review, it would also be appropriate for the Court to deny the petition rather than carry this case on the Court's docket for a lengthy period of time.

II. THE COMPLETE PREEMPTION QUESTION IS NOT PROPERLY PRESENTED AND, IN ANY EVENT, DOES NOT WARRANT PLENARY REVIEW

Petitioner also seeks review (Pet. 20-26) of the court of appeals' ruling on the merits of the removal question that this case was properly removed to federal court. The issue framed by petitioner is not properly presented and, in any event, does not warrant this Court's review.

Under 28 U.S.C. 1441(b), a civil action filed in state court may be removed to federal court if the plaintiff's claim "aris[es] under" federal law. See *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 6 (2003). Whether an action arises under federal law is determined by the well-pleaded complaint rule, which requires that a federal question be presented by the plaintiff's properly-pleaded complaint. Because a defense

is not part of the plaintiff's well-pleaded statement of his claim, and federal preemption is ordinarily only a defense, preemption generally does not provide a basis for removal. *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 207 (2004). Preemption does provide a basis for removal, however, when a federal cause of action occupies the field within which the plaintiff's claim arises and therefore "wholly displaces" any state-law causes of action on which the plaintiff might otherwise rely. *Beneficial Nat'l Bank*, 539 U.S. at 8. Where such "complete preemption" exists, the plaintiff's properly-pleaded claim "necessarily arises" under federal law even if the plaintiff purports to base the claim entirely on state law. *Id.* at 9; see *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393 (1987) (citing *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 (1983)). Generally, there are two prerequisites for complete preemption: (1) Congress must have created an "exclusive cause of action," and (2) the plaintiff's claim must "come[] within the scope of that cause of action." *Beneficial Nat'l Bank*, 539 U.S. at 8-9; see *Franchise Tax Bd.*, 463 U.S. at 24; *Caterpillar*, 482 U.S. at 388-399.

Petitioner contends that the LMRDA does not completely preempt his state-law claims because, although it gives the Secretary of Labor an exclusive cause of action to challenge the UAW's election on petitioner's behalf, the statute does not give petitioner himself a cause of action. That issue does not warrant review. There is no conflict among the courts of appeals on whether there can be complete preemption by the LMRDA. Indeed, no court, including the Sixth Circuit in this case, has squarely addressed the issue. And the abstract question whether there can ever be complete preemption when the plaintiff himself lacks a federal cause of action is not properly presented by this case, because it was not pressed or passed upon below.

A. There Is No Conflict Among The Courts Of Appeals On Whether The LMRDA Completely Preempts State-Law Claims Challenging Union Elections

The Sixth Circuit in this case is the only court of appeals that has addressed the propriety of removing ostensible state-law claims to federal court based on Title IV of the LMRDA. Even that court, however, did not conduct a traditional complete preemption analysis as set out in this Court's cases. See Pet. App. 8a-11a. Instead, the court of appeals referred generically to preemption and may have decided this case based on the erroneous premise that ordinary preemption is sufficient to justify removal. See *id.* at 11a (reasoning that remand was improper because petitioner's claims were "preempted by Title IV of the LMRDA"). Thus, there is no conflict among the courts of appeals on whether the LMRDA satisfies the requirements for *complete* preemption. Indeed, no court of appeals has squarely addressed that question. It would therefore be premature for this Court to address the issue here.

B. The Complete Preemption Question Presented By Petitioner Is Not Properly Before The Court

Petitioner contends (Pet. 20-26) that the Court should grant review to resolve a conflict in the courts of appeals over whether a claim can be completely preempted by a federal statute that does not provide the plaintiff with a private cause of action. That issue is not properly presented in this case.

Petitioner did not argue in the court of appeals that there is no complete preemption here because the LMRDA does not provide him with a cause of action. Petitioner does not dispute his failure to raise that issue below, but he contends that the issue is merely "a new argument" in support of his claim that there is no complete preemption. Pet. Reply 6. Far from being an additional argument in support of that claim, how-

ever, the cause-of-action question is the only complete-preemption issue that petitioner asks this Court to resolve. The question presented in the petition is framed entirely in terms of whether complete preemption can occur "absent a determination that Congress created an alternative private right of action." Pet. i. Because petitioner did not present that issue to the court of appeals, that court did not address the issue.

This Court does not generally address issues that were neither pressed nor passed upon in the court below. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). There is no reason for the Court to make an exception here.

C. The Novel And Abstract Nature Of The Complete Preemption Question Also Counsels Against Review

Even if the complete preemption question raised by petitioner were properly presented, this case would not be an appropriate one in which to address it. The question whether a federal statute can completely preempt a plaintiff's state-law claims if it does not provide the plaintiff with a cause of action should not be addressed in the abstract. Rather, it should be addressed in the context of a specific statute, and in light of judicial decisions carefully construing the statute, because the answer to the question may vary depending on the particular features of the statutory scheme. No court of appeals has addressed the cause-of-action question in the context of the LMRDA. There is no reason for this Court to attempt to resolve it in the first instance.[6]

The LMRDA falls within the class of federal statutes that displace state causes of action, provide a substitute federal

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[6] Moreover, the Court could not address the complete preemption issue without first deciding whether the court of appeals correctly exercised appellate jurisdiction, a question which, as explained above, implicates idiosyncratic aspects of the decision below and is not worthy of plenary review.

cause of action, but strictly limit the class of plaintiffs who can invoke that cause of action. The LMRDA creates an exclusive federal cause of action to challenge union elections but allows only the Secretary of Labor to invoke that cause of action. See 29 U.S.C. 482(b); *Local No. 82, Furniture & Piano Moving* v. *Crowley*, 467 U.S. 526, 544 (1984). For that category of statutes, the first prerequisite for complete preemption is clearly met: there is an exclusive federal cause of action. The complete preemption inquiry therefore can be understood as turning on whether the second requirement is met, *i.e.*, whether the plaintiff's claim comes within the scope of the federal cause of action. See p. 15, *supra*.

Some of this Court's precedents indicate that the fact that a particular plaintiff is not entitled to invoke a cause of action means that his claim is not within the scope of that cause of action. For example, in *Franchise Tax Board*, this Court held that Section 502(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1132(a), did not completely preempt a suit for back taxes by a state tax board against an employee benefit plan because the suit did not "come[] within the scope of one of ERISA's causes of action." 463 U.S. at 25. The Court reasoned that Section 502(a) does not provide a cause of action to anyone other than "participants, beneficiaries, or fiduciaries," and therefore "[a] suit for similar relief by some other party [like the tax board] does not 'arise under' that provision." *Id.* at 27.

Other of the Court's precedents, however, suggest that a plaintiff's ineligibility to invoke a federal cause of action does not conclusively establish that his claim is outside the scope of that cause of action. In *Avco Corp.* v. *Aero Lodge No. 735, International Ass'n of Machinists*, 390 U.S. 557 (1968), this Court held that an employer's state lawsuit seeking an injunction prohibiting a union from striking fell within the scope of Section 301 of the Labor-Management Relations Act, 29

U.S.C. 185, and was completely preempted, even though the Norris-LaGuardia Act barred the employer from seeking the injunction under Section 301. See 390 U.S. at 560-561. *Avco* demonstrates that a plaintiff's ostensible state-law claim may come within the scope of a federal cause of action and be completely preempted, even if the cause of action does not provide the plaintiff with a remedy. *Caterpillar*, 482 U.S. at 391 n.4. *Avco* thus supports an argument that a plaintiff's claim may fall within the scope of a federal cause of action and be completely preempted, even if the plaintiff is unable to state a valid claim under the cause of action, provided that the plaintiff's claim is within the field regulated by the cause of action. Moreover, when the limits on the federal cause of action are an integral part of the federal scheme, it would seem counterintuitive to find a claim to be not completely preempted precisely because it seeks relief antithetical to the pervasively federal regime.

There is a reasonable argument that private-party claims challenging union elections fall within the field addressed by the LMRDA's exclusive cause of action. The LMRDA makes clear that the remedy it provides is the exclusive means to challenge those elections. 29 U.S.C. 483. Although only the Secretary can bring suit to challenge election results, the Secretary's suit is triggered by a complaint filed by a private party who is aggrieved by the results. 29 U.S.C. 482(a). The Secretary is required to bring suit if there is probable cause to believe that there has been an unremedied violation of the LMRDA that may have affected the outcome of the election. 29 U.S.C. 482(b) and (c). The aggrieved party may seek judicial review of a decision by the Secretary not to bring suit and may intervene in a suit once it has been brought. See *Dunlop* v. *Bachowski*, 421 U.S. 560, 566 (1975); *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 536 (1972).

Given the unique nature of the LMRDA's remedial scheme and the case law discussed above, whether the cause of action provided by the LMRDA gives rise to complete preemption is not free from doubt. Because that question has not arisen with any frequency, has not yet been squarely addressed by any court of appeals, and is not properly presented in this case, this Court should not undertake to resolve the question here.

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the Court may wish to hold the petition pending the Court's decisions in *Kircher*, No. 05-409, and *Osborn*, No. 05-593.

Respectfully submitted.

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